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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA—AIRLINE DIVISION AND TEAMSTERS LOCAL 19,
Petitioners,

v.

SOUTHWEST AIRLINES COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Change in Drug Use Detection Methodology Constitutes a "Major" Dispute Under the Railway Labor Act?
2. Whether a Common Management Rights Clause Waives the Right to Bargain Over What Would Otherwise Be a "Major" Dispute?
3. Whether a Conclusion of Waiver Violates the Policy of the Railway Labor Act?

LIST OF ALL PARTIES TO THE PROCEEDINGS REQUIRED BY SUPREME COURT RULE 21.2(b)

Parties to the proceeding are as follows:

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3. Southwest Airlines Company
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA—AIRLINE DIVISION AND TEAMSTERS LOCAL 19,
Petitioners,

v.

SOUTHWEST AIRLINES COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America—Airline Division and Teamsters Local 19, pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered in the above-referenced matter on June 22, 1989.

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals in the case at bar are reported at 842 F.2d 794 and 875 F.2d 1129. The opinions are reproduced in Appendices A and B hereto. (App. 1a-63a; 67a-93a).

The trial court's order granting preliminary injunction which was orally entered on January 6, 1987 is reproduced in the Appendix as Appendix D. (App. 95a-109a).

JURISDICTION

This Petition seeks review of the order of the Court of Appeals entered on June 22, 1989. By Order dated September 5, 1989 Justice Byron R. White granted Petitioner's Motion for an Order Extending Time to File Petition for Writ of Certiorari to and including October 20, 1989. (App. 157a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

The Appendix contains the Railway Labor Act 45 U.S.C. § 151 *et seq.* (App. 110a-156a).

STATEMENT OF THE CASE

A. Nature of the Case

This is a Railway Labor Act injunction case involving disposition of whether the underlying dispute is "major" or "minor." Upon being notified of Respondent Southwest's intention to unilaterally impose a comprehensive drug testing program, Teamsters brought suit in the United States District Court for the Northern District of Texas, Dallas Division, alleging that such constituted a "major" dispute and seeking an injunction to enjoin implementation. Alternatively, Teamsters asserted that if the dispute was "minor" an injunction should be entered to preserve the *status quo* and jurisdiction of the parties' system board of adjustment.

B. Proceedings Below

Teamsters filed their original Complaint against Southwest in December, 1986. On January 6, 1987 hearing was held before the District Court on Teamsters' Application

for a Preliminary Injunction to enjoin implementation of the drug testing program. At the close of the hearing District Court granted the injunction upon alternative theories. First, the District Court concluded that the dispute was "major" and, therefore, to be enjoined. Alternatively, the District Court concluded that even if "minor" the dispute was to be enjoined, because under the unique circumstances the involved licensed aircraft mechanics would suffer irreparable harm if tested. (App. 95a-109a). Southwest appealed and initially a three-member panel of the Fifth Circuit unanimously affirmed upon the conclusion that the dispute was indeed "major." (App. 67a-93a).

Southwest sought rehearing *en banc* which was granted. (App. 94a). On June 22, 1989 eleven of the sixteen sitting Judges of the Fifth Circuit vacated the injunction while five Judges dissented. (App. 1a-63a).

This Petition seeks review of the *en banc* decision of the Fifth Circuit.[1]

STATEMENT OF FACTS

The only fact record was developed at a hearing on preliminary injunction. Review of the decisions of the Fifth Circuit reveals that there is no dispute about the facts. (App. 1a-4a; 20a-23a; 68a-73a).

Southwest Airlines ("Southwest") is a common carrier by air, subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Teamsters represent Southwest's mechanics

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[1] The Fifth Circuit's decisions each reviewed the District Court's granting of preliminary injunction. Based upon the Fifth Circuit's *en banc* decision, the District Court entered an order of dismissal on July 31, 1989 which Petitioners also appealed. There is presently pending in the Fifth Circuit a Motion to Affirm the District Court's Final Dismissal in favor of Southwest. Upon affirmance by the Fifth Circuit, Petitioners intend to move to consolidate that matter with this Petition. At that juncture review of a final decision, as opposed to a preliminary injunction, will be before this Court.

and related employees. Article 2, paragraph 4 of the parties' collective bargaining agreement provides:

> Employees covered by this Agreement shall be governed by all Company rules, regulations, and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which have been made available to the employee prior to becoming effective.

That collective bargaining agreement contains no rules against drug and alcohol abuse. Prior to 1986 Southwest had unilaterally imposed work rules including Rule G, which prohibits and makes subject to discipline:

4. Reporting for or carrying on work while showing any signs of the use of intoxicants or knowingly permitting another employee to do so is strictly prohibited.

5. Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on company premises or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated.

The District Court found that before October 1986, Southwest had no existing practice for detecting violation Rules G(4) and G(5) other than visual observation. The District Court also found Southwest had no history of problems with drug and alcohol abuse and no history of Rule G enforcement.

Nevertheless, on October 16, 1986 Southwest advised Teamsters of its intention to unilaterally implement a drug and alcohol testing program. The program is comprehensive, detailed and primarily consists of (App. 70a-72a fn. 5-8):

(1) A general work rule or policy which prohibits detectible levels of illegal drugs, defines alcohol intoxication as a blood level of .05% and prohibits

use of over-the-counter and prescription drugs which might impair performance;

(2) Mandatory pre-employment urine drug screens and mandatory urine drug screens of employees under certain defined circumstances;

(3) Detailed testing rules including employee releases, confidentiality and chain of custody safeguards, use of confirmatory tests in the event of positive initial resllt and provisions for a second test at an employee's request; and

(4) Establishments of punishments and procedures to be followed in the event of a violation of the policy.

Teamsters sought to bargain over the terms of the program. While Southwest was willing to discuss the program, it refused to bargain over its terms.

On January 1, 1987, Southwest implemented the program. Teamsters brought this suit and sought a preliminary injunction. The District Court enjoined the program, concluding that its implementation constituted a "major" dispute under the Railway Labor Act. The District Court supported its conclusion by finding that the program constituted a comprehensive means of monitoring, testing, and punishing violations of rules prohibiting drug and alcohol use or possession, and that such was not arguably justified by Rule G or a practice of enforcing Rule G. The District Court further concluded that each element of the program constituted a "major" change warranting an injunction. Alternatively, the District Court concluded that even if the disputes were deemed "minor" there existed a substantial likelihood of irreparable harm warranting an injunction to preserve the *status quo* pending arbitration of the dispute under the terms of the parties' labor contract. (App. 95a-109a).

A three-judge panel of the Fifth Circuit affirmed upon a conclusion that the dispute was "major" and, therefore, to be enjoined. Southwest sought rehearing *en banc* which

was granted. On June 22, 1989, the Fifth Circuit *en banc* dissolved the injunction. The majority concluded that Article 2, paragraph 4 of the parties' contract which grants the company the right to make rules and regulations "arguably" constituted a "clear and unmistakable" waiver of Teamsters' statutory right to bargain over the terms of the drug testing policy. The majority concluded the dispute was therefore minor. The Court also concluded that the irreparable harm found by the District Court was not of the sort warranting a *status quo* injunction pending submission of the dispute to the parties' agreed arbitration procedure. Five judges dissented including the three that issued the initial decision. (App. 1a-63a).

Only a few days separated issuance of this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, —— U.S. ——, 105 LEd.2d 250 (June 19, 1989) (*"Conrail"*) and the Fifth Circuit's June 22, 1989 *en banc* decision. The Fifth Circuit entered a supplemental order upon notice of *Conrail* concluding the same result obtained upon application of *Conrail* to the facts of this case. (App. 64a-66a).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Decision Creates a Conflict Among The Circuits Concerning Whether Changes in Drug Use Detection Methodology Constitutes a Major Dispute.

Prior to Southwest's comprehensive program, the parties' written agreement was silent concerning drug testing. However, the contract included an implied but unwritten provision embodied in Rules G(4) and G(5) *supra* p. 4 and enforced *only* through visual observation.

Obviously, Southwest's program here at issue radically changed not only the rules pertaining to drug use but,

even more dramatically, the detection methodology. Three other circuits have concluded that such changes constitute a major dispute. *Transport Workers Union v. SEPTA*, 863 F.2d 1110, 1122-24 (3rd Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1087, 1092-93 (9th Cir. 1988), *cert. granted and remanded*, 109 S.Ct. 3207 (June 26, 1989); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1102, 1105-07 (9th Cir. 1988); and *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016, 1022-23 (8th Cir. 1986). *Conrail* did not resolve this issue.[2]

The majority decision creates a conflict among the circuits with respect to whether a change from the parties' agreed method of detection constitutes a "major" dispute.

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[2] The Fifth Circuit majority before and separate from concluding that the Management Rights Clause (*supra*, p. 4) waived Teamsters right to bargain also and inexcusably concluded the Management Rights Clause on its fact "arguably" permitted implementation of the program. The Court concluded it was "undeniable" that the Management Rights Clause gave Southwest the right to make and implement rules and regulations under four conditions all of which the Court concluded existed. One of those conditions is that the rule must not conflict with a provision of the contract. However, the District Court found that this contract had in place provisions implied by practice (Rules G(4) and (5)), which were enforceable through visual observation. Quite obviously, the new program conflicts dramatically with these implied contract provisions. The majority is wrong by failing to take account of the fact that a labor contract is both its written language and the practices arising under it. *Detroit and Toledo Short Line R.R. v. UTU*, 396 U.S. 142 (1969) and *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986). Clearly, the majority erred in this conclusion. (App. 9a-11a).

II. The Decision of the Fifth Circuit is Contrary to This Court's Decision in *Conrail* and Creates a Division Among the Circuits Concerning Waiver of the Right to Bargain.

In *Conrail* this Court restated what most in the labor relations community believed was the test to distinguish "major" from "minor" disputes. That test is:

> If the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial," the dispute is a [minor dispute].

(at 105 L.Ed.2d 263)

In *Conrail* and every case previously decided applying the test it adopted, the focus was upon whether an identified express or implied provision of the labor contract "establishes or refutes the presence of a right to take the disputed action." *id.* That inquiry is to be focused upon whether a provision—the interpretation of which is disputed—permits the action in question. For example in *Conrail*, the focus was upon whether a contract provision inferred from a long standing practice of urine testing "arguably" permitted drug testing of urine samples.

This case does not present the question answered by *Conrail*. Here, there is no contract provision—either express or implied—which grants Southwest the right to drug test. The Fifth Circuit concluded that a standard Management Rights Clause permitting Southwest to make rules and regulations "arguably" waived Teamsters statutory right to bargain. No evidence other than the written contract provision implies the existence of waiver. But for the "arguable" waiver the dispute would have been deemed major.[3]

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[3] See footnote 2 *supra*.

Conrail, its precursors and the "arguable" test have the intent of requiring submission of disputes which involve and can be resolved by interpretation of the parties contract, to the dispute resolution mechanism of that contract. None concluded or envisoned that the same "arguable" test would be extended to determinations of the existence of legal or equitable defenses. To this extent the Fifth Circuit's decision is contrary to the *Conrail* decision.

Perhaps the difference and inconsistency between *Conrail* and the Fifth Circuit decision can be made clearer by noting the conceptual and lingusitic tortouring necessary to reach the Fifth Circuit's result. It is not difficult to accept the notion that because honest men may differ, different and "arguable" interpretations of a contract clause may be held. *Waiver* of the dearly held right to bargain granted in both § 6 of the Railway Labor Act ("RLA") and the National Labor Relations Act,[4] as statutory rights central to the purpose of each statute is a matter of law, not mere contract interpretation. Hence, a waiver of the right to bargain must be "clear and unmistakable." By appending the *Conrail* test to waiver, the almost silly sounding question which must be answered is whether the contract is "arguably" "clear and unmistakable" in giving away the Union's right to bargain. "Arguable" is a term of ambiguity and uncertainty; "clear and unmistakable" is a term of exacting certainty and using the two together renders each linquistically and conceptually meaningless.

Moreover, and as eloquently presented in the dissent in the Fifth Circuit, waiver is a question of law not suited to analysis of whether it "arguably" exists. Important statutory—not contract—rights are at stake here. Referring legal issues pertaining to those statutory rights to arbitration is beyond the intent of *Conrail*. (App. 32a-42a).

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[4] 45 U.S.C. § 156, and 29 U.S.C. § 158(a)(5) and (d).

The Fifth Circuit majority decision is also at odds with other circuits—including one of its own earlier decisions.

In both *Transportation Workers Union v. SEPTA*, 863 F.2d 1110, 1122-24 (3rd Cir. 1988) and *United Industrial Workers v. Board of Trustees*, 351 F.2d 183 and 368 F.2d 412 (5th Cir. 1966) those Courts rejected employer arguments that a broad management rights clause granted it unfettered right to act where the labor contract was otherwise silent. In particular, *Transport Workers v. SEPTA* involved an employer's claim to drug test under a management rights clause much like that in this case. There the employer retained "all management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement." The Third Circuit found no basis in this language to effect the bargaining obligation of the RLA and ruled the dispute major. Plainly, the decision below is at odds with the Third Circuit. This matter was thoroughly addressed by the dissent in the Fifth Circuit. (App. 42a-47a).

III. The Fifth Circuit Decision Violates the Scheme of the Railway Labor Act.

Simply stated, "major" disputes are to be resolved in bargaining or through use of economic force. "Minor" disputes are for resolution through arbitration. If the Fifth Circuit's application of the "arguable" test to waiver stands, the "major"/"minor" distinction will practically cease to exist. Virtually all modern labor contracts contain Management Rights Clauses which permit the employer to unilaterally take action which is not expressly contrary to the parties' contract.[5] The parties conceded at trial and the Fifth Circuit majority and dissent acknowledged that if such Management Rights

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[5] *See* authorities cited at footnote 23 of the dissent. App. 33a.

Clauses constitute a waiver, there exist no "major" disputes. That is, any employer action would be merely "minor" because the union arguably waived its right to bargain on every subject by agreeing to such management rights clauses. (App. 13a, 34a).

Bargaining is central to the Railway Labor Act and the national labor policy. It occurs under the Railway Labor Act only when disputes are "major." This whole statutory and policy scheme evaporates when the "arguable" test is applied to determine the existence of waiver. Virtually all labor contracts include a form of the clause constituting the "arguable" waiver in this case. If "arguable" is the test for waiver, then "major" disputes cease to exist as does a central policy of the Railway Labor Act.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the order of the Fifth Circuit issued *en banc*.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No.87-1085

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA-AIRLINE DIVISION AND TEAMSTERS LOCAL 19,
Plaintiffs-Appellees,

v.

SOUTHWEST AIRLINES COMPANY,
Defendant-Appellant.

June 22, 1989

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case presents the question whether the union's objection to the unilateral imposition of a comprehensive, mandatory drug testing program constitutes a "major" dispute under the Railway Labor Act that must be negotiated with the union before it can be implemented by Southwest Airlines, or whether the drug testing program was arguably justified by the existing collective bargaining agreement and hence was a "minor" dispute that must be arbitrated.

I

A.

Southwest Airlines Co. ("Southwest") is a common carrier subject to the Railway Labor Act ("RLA"). The International Brotherhood of Teamsters ("the Teamsters") represents Southwest's mechanics and related employees. Article 2, paragraph 4 of the relevant Teamsters and Southwest collective bargaining agreement provides:

> Employees covered by this Agreement shall be governed by all Company rules, regulations and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which have been made available to the employee prior to becoming effective.

Before 1986, Southwest's drug and alcohol policy consisted mainly of Rule G, a rule of many years' standing that had been unilaterally promulgated. Its provisions defined "serious, unacceptable conduct" and included the following:

> 4. Reporting for or carrying on work while showing any signs of the use of intoxicants or knowingly permitting another employee to do so is strictly prohibited.
>
> 5. Possession of or drinking of any intoxicant or illegal possession or use of illegal dangerous drugs on Company premises or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated.

Rule G had no significant history of enforcement; nor did Southwest have a known problem with employee use of alcohol or drugs. Nevertheless, Southwest decided to expand its drug policy. Specifically, it decided to implement a drug and alcohol testing program. The program

is comprehensive and detailed. It prohibits detectable levels of illegal drugs, defined blood alcohol levels, and any level of medication that could impair performance, as well as any possession of illegal drugs. To enforce these prohibitions, the program mandates pre-employment urine drug screening, and urine drug screening of employees after accidents or if management has a reasonable suspicion of drug or alcohol use. The program establishes detailed testing procedures, and prescribes punishment, including discharge, for violations of the policy.

On October 16, 1986, Southwest informed the Teamsters of its intention to implement the program. The Teamsters then sought to bargain over the terms of the program. Southwest was willing to discuss the program, but refused to negotiate with the Teamsters over it. Other unions did participate in discussions with Southwest, and these discussions affected the shape of the program.

B.

In December 1986, the Teamsters filed this action, seeking to enjoin Southwest's unilateral imposition of the program. In January 1987, the district court granted a preliminary injunction. The district court reasoned that the implementation of the program was not arguably justified under the terms of the collective bargaining agreement and that, therefore, the dispute was "major" and thus subject to bargaining before implementation. In the alternative, the district court held that even if the dispute were "minor," a preliminary injunction was warranted by the likelihood of irreparable harm to employees if the program were enforced before the union's objections to the program could be arbitrated.

Southwest appealed the preliminary injunction and it was affirmed. 842 F.2d 794. The panel concluded that the program was a mandatory subject of bargaining under the RLA that had not been clearly and unmistakably waived by the Teamsters in the management rights

clause of the agreement. Next, the panel agreed with the district court that the dispute was "major" because it was not arguably justified by the management rights clause, Rule G, or past practices of the parties. As a major dispute, the matter was subject to bargaining and could not be unilaterally imposed by Southwest.

Sitting *en banc*, we disagree that the dispute is major; we thus reverse the district court and dissolve the injunction.

C.

We first note that this case continues to present a justiciable controversy. Although the agreement precipitating the suit has since terminated and a new one has been negotiated, the parties did not bargain about or agree upon a resolution to this dispute. The relevant terms of the new agreement track those of the old. Furthermore, Southwest adheres to its position that it is entitled to implement unilaterally its drug testing program, and has expressed its intention to do so should this court vacate the injunction. The union continues to object to the unilateral imposition of the program. The injunction has not expired of its own force.

Therefore, in deciding whether the injunction should stand, we need not avoid the merits of the suit by finding it moot. A case is not moot so long as "the prospect of repetition may affect continuing relationships in clear and tangible ways." C. Wright, A. Miller, and E. Cooper, 13A *Federal Practice and Procedure*, § 3553.3 (2d ed. 1984). Labor litigation, which presents both the problem of lapsed contracts and settled suits, has frequently required courts to determine whether such "clear and tangible" influence continues despite changes in the relation between the parties. In order to deal with this problem, there has arisen "a doctrine, apparently peculiar to labor questions, that governs the determination of mootness when parties agree on a new contract during the pendency of the suit." *Division 580 v. Central New York*

RTA, 578 F.2d 29, 32 (2d Cir.1978). The special treatment due labor questions has been recognized several times by the Supreme Court. *See, e.g., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 704 n. 1, 102 S.Ct. 2672, 2776, n. 1, 73 L.Ed.2d 327 (1982); *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 403 n. 8, 96 S.Ct. 3141, 3146 n. 8, 49 L.Ed.2d 1022 (1976); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). In *Jacksonville Bulk Terminals*, the Court adjudicated a dispute arising out of a work stoppage. The stoppage had been voluntarily abandoned six months before the Court heard argument, but the Court held the case justiciable nonetheless. It commented, "[T]here remains a live controversy over whether the collective-bargaining agreement prohibits politically motivated work stoppages, and the Union may resume such a work stoppage at any time. As a result, this case is not moot." 457 U.S. at 704 n. 1, 102 S.Ct. at 2676 n. 1. Similarly, the Court found a live controversy in *Buffalo Forge* despite the fact that the collective bargaining agreements in effect when the action arose had expired, where the parties stipulated that those agreements governed the resolution of that dispute. 428 U.S. at 403, n. 8, 96 S.Ct. at 3146 n. 8. In the same way, the parties here, in effect, simply declined to settle this action when they negotiated a new agreement without resolving this dispute. Thus, our case is no less justiciable than *Buffalo Forge* or *Jacksonville Bulk Terminals*.

II

A.

The premise of the Teamsters' request for an injunction begins with Southwest's duty to bargain with the union before imposing terms of employment, including rates of pay, rules, and working conditions. 45 U.S.C. § 152. First, Second. Once bargaining has resulted in

an agreement, however, not all disputes over changes in the terms of employment are subject to a continuing duty to negotiate. Rather, the RLA distinguishes the procedures for resolution of two different types of disputes that arise under a collective bargaining arrangement, which have come to be known as major and minor disputes. See *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 722-28, 65 S.Ct. 1282, 1289-92, 89 L.Ed. 1886 (1945). "Major" and "minor" do not necessarily refer to important and unimportant disputes, or significant and insignificant issues; rather, the terms refer to the bargaining context in which a dispute arises. Major disputes involve proposals for new agreements or for changes in existing agreements. *Id* at 723, 65 S.Ct. at 1289. Minor disputes, on the other hand, involve grievances over the application of an existing agreement. *Id.* This distinction matters because the RLA prescribes differing courses for the resolution of these two types of disputes. Major disputes go first to mediation: if not resolved, the parties may agree voluntarily to arbitrate, or the President may intervene, 45 U.S.C. § 155, First, § 160. During these steps parties must abide by the existing agreement; only if these steps fail may the parties resort to strikes or other self-help or, in the case of management, unilateral action. *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 107 S.Ct. 1841, 1851, 95 L.Ed. 2d 381; 45 U.S.C. §§ 155, 156, 160. Until these preliminary steps are exhausted, unilateral action can be enjoined. *International Association of Machinists v. Frontier Airlines, Inc.*, 664 F.2d 538, 540-41 (5th Cir.1981).

Minor disputes are treated differently. If the parties do not agree on the interpretation or application of an agreement, the dispute is submitted to arbitration before an adjustment board. 45 U.S.C. § 153. Unlike its policy governing major disputes, the RLA does not prohibit unilateral action based on a party's own interpretation of the agreement pending exhaustion of arbitration; only in a narrow set of cases may unilateral action be enjoined

during resolution of a minor dispute. *Frontier Airlines*, 664 F.2d at 541. Thus, the propriety of the injunction imposed by the district court turns on whether the dispute over Southwest's right under the agreement to implement the drug testing program unilaterally is a major or a minor dispute.

Case law has refined the test for whether a dispute is minor. Under Fifth Circuit precedent, a dispute is minor if the existing collective bargaining agreement affords some arguable basis for the underlying action. *REA Express, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir. 1972) (quoting *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 188 (5th Cir.1965)). *REA Express* involved a claim by management that an agreement provided a procedure for altering truck runs. 459 F.2d at 230. According to the court, "[t]he key word in this test is 'arguable.' If the court finds an arguable basis it must defer to the expertise of the Adjustment Board." *Id.* at 231. In a similar, earlier case, where a railroad based its right to abolish yardmaster positions on a clause (Rule 16(e)) providing that the agreement "shall not be construed as . . . restricting the Company's right to discontinue yardmaster positions," this circuit reversed a lower court decision that the dispute was major. *St. Louis, Santa Fe and Topeka Ry. Co. v. Railroad Yardmasters of America*, 328 F.2d 749, 751, 754 (5th Cir.1964).

> Unless we are to ignore completely the language of Rule 16(e) which on its face, according to the ordinary understanding of the English language does authorize the abolition of yardmaster positions, we are at a loss to understand how it could be decided that the rights of the union can be determined without a construction of the employment contract or agreement. We do not, of course, . . . attempt to construe the contract. This is to be done by the appropriate

> tribunal. We do say that a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue. Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16 (e).

Id. at 753.

Other cases have also applied this test to disputes over management's right under an agreement to take certain actions. *See, e.g., Railway Express Agency, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks,* 437 F.2d 388 (5th Cir. 1971). In *Railway Express Agency,* the Court described a dispute over a change in work assignment as follows:

> The dispute in reality is over the breadth of management's prerogative . . . . [T]here is no express provision allowing management to transfer the work unilaterally. However, the agreement does expressly reserve "the right of management to determine methods of operation and the utilization of the working forces. . . ." Moreover, there is an undisputed history of such unilateral transfers of work with no apparent objection from the union. It may be concluded . . . that this state of facts gave REA at least the arguable right to make the transfer. . . . Whether it actually has such a right must be determined by the Special Adjustment Board.

Id. at 392. In reaching this conclusion, the court in *Railway Express Agency, id.* at 393-94, relied heavily on *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers,* 307 F.2d 21 (2d Cir.1962). In *Rutland,* the Second Circuit was faced with the question.

> whether the railroad has the unilateral right to make . . . changes [in train schedules] without negotiating about them with the brotherhoods. . . .

> Whether it be a major or a minor dispute, the disagreement is a dispute over the scope of the railroad's managerial prerogative. It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

307 F.2d at 33-34 (citations omitted). The court there went on to hold that the dispute was minor even though no provision in the agreement explicitly granted the railroad the right to make the challenged changes unilaterally. *Id.* at 35-36 (citing cases where courts faced with similar disagreements classified the disputes as minor).

These cases clearly establish the rule that if the management's underlying action is arguably justified by the collective bargaining agreement, the dispute is minor. *Railway Express*, 459 F.2d at 231. In other words, if management's construction of the collective bargaining agreement and its unilateral action pursuant thereto create an issue that is not fictitious or merely colorable, then the issue should be resolved by the appropriate arbitration board. *St. Louis, S.F. & T. Ry.*, 328 F.2d at 753.

B.

(1)

Although the district court recited and applied this standard, we cannot accept its conclusion that this clause did not even arguably justify the program. On its face,

this clause at least *arguably* grants management the right to enforce its policy by unilaterally promulgating rules, regulations, and orders such as this drug testing program. The clause provides:

> Employees covered by this Agreement shall be governed by all Company rules, regulations and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which have been made available to the employee prior to becoming effective.

In harmony with its provisions, the following facts cannot be denied: (1) the program consists of rules, regulations and orders within the meaning of this clause; (2) the program was issued by the proper authorities of the company; (3) no term or condition of the collective bargaining agreement conflicts with the program; (4) the program was made available to employees prior to becoming effective. Thus, Southwest seems to have complied fully with all conditions of the management rights clause to which the union had agreed. As a result, it is *arguable* that the program is a proper exercise of management's rights. The *merits* of the interpretation of the agreement are clearly for the arbitrator to decide.

The panel opinion nevertheless states that this clause "does not speak at all to the right to bargain over rules, only the willingness to abide by rules validly enacted." Although this may ultimately be the correct interpretation of the clause, we decline to say that the plausibility of such interpretatiaon bars the contrary view that the clause binds employees to any and all rules that do not conflict with the agreement and that are promulgated by management with advance notice. Since the outcome thus turns on a choice between two arguable constructions, the dispute is minor, and must be submitted to arbitration.

This conclusion is further supported by the history of rule-making under the agreement. Southwest unilaterally promulgated Rule G, a rule establishing a drug and alcohol policy. Although Rule G has not required significant enforcement, its existence demonstrates a history under the agreement of unilaterally promulgating rules supporting a drug and alcohol policy. Thus, although the drug testing program is more extensive than Rule G, the unquestioned validity of Rule G, when considered in tandem with the management rights clause, indicates that the new program is arguably justified by the collective bargaining agreement.

(2)

The Teamsters argue further, however, that Southwest's unilateral implementation of the program will infringe on the union's statutory right to bargain. The panel held, and we agree, that the program effects a change in rules and working conditions and therefore is a mandatory subject of bargaining. Of course, the same is true of any new rule or order promulgated under the management rights clause that affects working conditions, however insignificant such rule might be. The panel also held, however, that Southwest had to bargain over the program because the management rights clause does not constitute a waiver of the union's right to bargain about rules, regulations, and orders such as the drug testing program.

In general, the contractual waiver of a statutory right under federal labor law must be clear and unmistakably expressed. *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 707-708, 103 S.Ct. 1467, 1476-77, 75 L.Ed.2d 387 (1983). *Metropolitan Edison* concerned a no-strike clause, but this general rule of construction has been applied to questions of waiver of the duty to bargain. *See, e.g., NL Industries, Inc. v. NLRB*, 536 F.2d 786, 788-89 (8th Cir.1976); *Pepsi-Cola Distributing Co.*, 241 N.L.R.B. 869 (1979); *Ador Corp.*, 15 N.L.R.B. 1658

(1965); *General Motors Corp.*, 149 NLR.B. 396, 399-400 (1964). All of these cases, however, arose under the National Labor Relations Act ("NLRA"). We are not certain that this rule of construction applies identically to the RLA. The rule operates to protect rights defined by statute. Thus, we turn to the RLA to examine the nature of the bargaining right at issue here. The RLA, like the NLRA, does create a duty to bargain. Unlike the NLRA, however, the RLA distinguishes minor from major disputes and thereby defines within the statute the specific procedures governing the right to bargain, including the proper forum for resolving disputes over the extent of that right under an existing agreement. Thus, the statutory right to bargain created by the RLA, unlike that of the NLRA, is limited by the RLA's precise regulation of procedures for dispute resolution. We note, furthermore, that none of this circuit's cases involving contractual claims to management rights (see discussion above), discusses the issue in terms of a "clear and unmistakable waiver." In fact, there appears to be a tension between deciding on the one hand whether a management rights clause *arguably* permits management to take some action, and deciding on the other hand whether such a clause *clearly and unmistakably* waives the right to bargain. Given the difference between the statutes, and given our prior cases, we find it to be a debatable matter of law whether, or to what extent, the rule of construction requiring that a waiver of bargaining rights under the NLRA be clear and unmistakable applies in a case arising under the RLA.

We find, however, that we are not squarely presented at this time with the question of how the "clear and unmistakable" rule applies to RLA cases. Even assuming, as the panel opinion assumes, that the management rights clause can give Southwest the right unilaterally to implement the program only if the clause is a clear and unmistakable waiver, the construction proposed by South-

west satisfies the minimal burden of arguably being a clear and unmistakable waiver. As noted above, the clause on its face binds employees, for the period of the agreement, to all rules, regulations, and orders that are issued by proper authorities, are not in conflict with other terms of the agreement, and are published in advance. Since there is no dispute that these conditions have been satisfied here, it seems clear that the drug testing program is a rule or regulation that falls within the terms of the management rights clause. Thus, there is an obvious argument that this clause constitutes a clear waiver of the union's right to bargain over *all* rules, including the new drug rules. We reiterate, of course, that we are not actually deciding the applicability or scope of this clause. We decide only that the arbitration board is the forum authorized to construe the clause.

III

The district court held in the alternative that, even if the dispute is minor, an injunction is nevertheless warranted because of the potential harm of an improperly implemented drug testing program. We review this alternative holding under a deferential standard, and reverse only for abuse of discretion. *Frontier Airlines*, 664 F.2d at 542. We also note, however, that the proper grounds for granting an injunction against action that is the subject matter of a minor dispute under the RLA are extremely narrow. *Id.* at 541-42. Such injunctions may issue only where necesary to preserve the jurisdiction of the grievance procedure, or where a disruption of the status quo would result in irreparable injury of such magnitude that it would render any subsequent decision meaningless. *Id.* at 542. The district court found that irreparable harm to an employee's reputation could result, for example, from disciplinary actions taken against that employee or from an employee's refusing to be tested under the program. Since many employment disputes involving discharge implicate the reputation of

an employee, we do not believe that this speculative possibility of irreparable harm is of the magnitude required to support an injunction in the context of a minor dispute. Accordingly, we hold that it was an abuse of discretion to issue an injunction on the facts of this case.

IV

The drug testing program implemented by Southwest is arguably justified by the management rights clause in the agreement. Thus, this dispute is minor, and the district court's injunction pending the dispute's resolution was improper. Accordingly, the injunction is

VACATED.

GOLDBERG, Circuit Judge, with whom POLITZ, JOHNSON, and JERRE S. WILLIAMS, Circuit Judges, join dissenting:

> Old Mother Hubbard
> Went to the cupboard,
> To fetch her poor dog a bone;
> But when she got there
> The cupboard was bare,
> And so the poor dog had none.

The panel opinion in this case stands in response to the *en banc* majority's decision today. 842 F.2d 794. I add these dissenting words to emphasize that if the cupboard is barren, it is only because the majority has decided to empty it. Assuming the hegemony of management prerogative, the majority dresses its holding in the diaphanous garb of a Mother Hubbard Clause.[1] But the

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[1] Mother Hubbard is not well-known in the field of labor relations. The term "zipper clause" is more commonly used to describe the type of management rights clause that the majority assumes arguably controls this case. *See* Part IV(A) *infra*. Mother Hubbard is widely recognized, however, among oil and gas litigants, *see, e.g., Paul Rochester Investment Co. v. United States*, 692 F.Supp. 704, 710-11 (N.D.Tex.1988), not to mention children the world around.

majority has paid a high price for its chosen garment. The decision clashes with the law of other circuits, and leaves the fabrics of both the parties' contract and the Railway Labor Act torn and frayed.

This case simply concerns the relative volumes of a Union's and employer's voices under a collective bargaining agreement.[2] We have no occasion to address either the wisdom or propriety of drug testing. The Union is not opposed to drug testing *per se* (R. 114). The Union's members simply wish to exercise their statutory right to bargain over the program's terms, and the Union rightfully believes that its members' ideas and interests are properly expressed in the major dispute process in the first instance, not weighed in the arbitral scales.[3]

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[2] *See* A. Hirchman, *Exit, Voice and Loyalty* (1970).

[3] In this age of the drug scourge, we cannot allow this labor dispute to be colored by whether employees' contractual rights should or may be subordinated to employer or social interests in safety, efficiency or property. Cf. *Skinner v. Railway Labor Executives Association*, —— U.S. ——, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (Federal Railway Administration drug testing regulations do not violate Fourth Amendment).

The Federal Aviation Administration ("FAA") has issued extensive drug testing regulations that impose requirements on air carriers including Southwest, and the regulations appear to extend only to some of the employees represented by the Union. 53 Fed. Reg. 47024 (Nov. 21, 1988) (available on LEXIS, Genfed Library, Fedreg file). Many aspects of these regulations appear to be constitutional. *See Skinner v. Railway Labor Executives Association*, —— U.S. ——, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

Under the FAA regulations, Southwest was required to have submitted a testing plan for approval to the FAA not later than April 20, 1989. The FAA regulations require an air carrier to implement preemployment testing of job applicants not later than 10 days after FAA approval of the carrier's plan. Air carriers are required to implement the remainder of their plans not later than 180 days after FAA approval. Pursuant to the regulations, FAA approval makes the plans effective.

The FAA regulations do not sweep as widely as Southwest's program in certain respects. Thus, if the parties reach the bargain-

According to the majority, implementation of the testing program would "effect[] a change in rules and working conditions." Thus, this contest is subject to the major dispute resolution process under the statute [4] unless the Union has waived its right to bargain over the change. The majority routes this dispute to the adjustment board, holding that the Union has arguably waived its members' bargaining rights.[5] The majority holds (1) that the con-

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ing table, there will be elements of Southwest's program that may not be mandated or precluded by federal law. Southwest must bargain over such elements if the Union has not waived its right to bargain.

Although it is not difficult to comprehend that critical components of the FAA regulations will impose on both parties as a matter of law what the Union wished to negotiate when it filed this lawsuit, I analyze the substance of Southwest's program as it has reached this court in stating my position in this case. Whatever is nonnegotiable as a result of the FAA regulations would become apparent if the parties reach the bargaining table.

See also note 31 *infra*.

[4] An employer has a statutory duty to bargain in good faith over proposed changes in working conditions. 45 U.S.C. §§ 152, 155, 156. Proposals to change or unilateral attempts to change rates of pay, rules or working conditions are subject to the major dispute process. 45 U.S.C. §§ 155, 156, 160; *Elgin J. & E. Railway Co. v. Burley*, 325 U.S. 711, 723-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945); *Order of Railroad Telegraphers v. Chicago & Nw. Ry.*, 362 U.S. 330, 80 S.Ct. 761, 766, 4 L.Ed.2d 774 (1960); *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 189-91 (5th Cir.1965); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1087, 1093 (9th Cir.1988), *cert. pending*, 57 U.S.L.W. 3017 (July 19, 1988); *see First National Maintenance v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 2585 n. 23, 69 L.Ed.2d 318 (1981). *See also infra* Part IV.

[5] Although the majority does not hold that a union may waive its members' privacy rights, the majority's cavalier treatment of a management rights clause in this delicate area is disturbing. There are limitations on a union's ability to bargain away employee rights. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147 (1974) ("an employee's rights under Title VII are not susceptible of prospective waiver") (cita-

tract is materially silent,[6] which allows the management rights clause to play a role in this case; and (2) that the management rights clause is arguably a global zipper

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tion omitted). There may be similar limitations on a union's attempt to bargain away privacy rights guaranteed by state and federal common law statutes and constitutional provisions applying to the conduct of non-state actors. *See Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. ——, 108 S.Ct. 1877, 1883 n. 9, 100 L.Ed.2d 410 (1988) ("Whether a union may *waive* its members' individual, nonpre-empted state law rights is . . . [an] issue we need not resolve today") (emphasis in original); *see also* P. Levy, State Regulation of Drug Testing: Are Organized Workplaces Exempt?, 1988 U.Chi.Legal F. 141; *but see Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086 (9th Cir.1988) ("Resolution of the issue whether [the union] has bargained away its members' claimed [privacy rights under the California Constitution] must rest upon interpretation of the collective bargaining agreement [and the claims are therefore preempted under 29 U.S.C. § 185(a)] (1982)"), *cert. denied*, —— U.S. ——, 109 S.Ct. 1530, 103 L.Ed.2d 835 (1989); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 119 (1st Cir.1988) ("the underlying issues raised by [appellant's] privacy claims . . . depend to a great extent upon the concessions the unions made regarding working conditions during collective bargaining"). While I do not agree with the language concerning waiver in either *Utility Workers* or *Jackson*, the cases demonstrate that employees in some jurisdictions may have little to rely on in the area of drug and alcohol policy enforcement apart from the bargain their union has struck for them.

The majority routes this dispute to the arbitral forum. If the arbitral forum concludes that Southwest must bargain over the terms of the programs, then there may be limitations on the Union's ability to bargain away employee privacy rights. There may be limitations in any case, apart from federal labor law, on Southwest's ability to impose certain terms of the testing program on the employees. *But see* Federal Aviation Administration Drug Testing Regulations, 53 Fed. Reg. 47024 (Nov. 21, 1988); *Skinner*, —— U.S. ——, 109 S.Ct. 1402.

[6] The majority states that "the following *fact*[] *cannot be denied*: . . . no term or condition of the collective bargaining agreement conflicts wiith the [testing] program" (emphasis added). I assume *arguendo* in Part IV below that the testing program at least arguably conflicts with existing contractual terms.

clause cutting solely in Southwest's favor. Under both the Railway Labor Act and the facts of this case, the majority's holding is sweeping and unjustified, but at least one point must be clear: the majority does not hold simply that the Union has arguably waived its right to bargain over the terms of a drug testing program, which would be disturbing enough; the majority holds that the Union has arguably waived its right to bargain over *any* change in working conditions when the contract is silent.

My opinion is divided into five parts. In Part I, I briefly describe the facts. Part II addresses why this case is not moot, and why abstention would not be prudent. In Part III, I outline the none-too-simplistic statutory scheme controlling our inquiry.

Part IV addresses the majority's *ratio decidendi:* that the bargaining agreement's management rights clause is arguably a zipper clause by which the Union has arguably waived its members' bargaining rights. The majority's *ratio decidendi* stems from a cavalier treatment of deeply-embedded waiver principles. Absolutely nothing in the record below, apart from the language of the management rights clause itself, suggests waiver, arguable or otherwise. No less important, the majority's result is inconsistent with both the statutory scheme and case authority.

Finally, in Part V, I demonstrate that the majority should not even reach its *ratio decidendi* because the management rights clause should play no role in this case. The clause does not apply by its own terms, whatever it means, if a unilaterally attempted or proposed change in working conditions would conflict with existing terms of the bargaining agreement. An industry work rule, Rule G, contains the parties' contemplated drug and alcohol policy under the contract. Visual observation [7] is the par-

[7] The phrase "visual observation" describes relatively nonintrusive supervisorial and co-worker observation of employee behavior to

ties' contemplated method of Rule G enforcement under the contract. The testing program contains both a revised policy [8] and a radically different method of policy enforcement: blood alcohol testing and urinalysis.

Nothing in the record suggests that the Union has acquiesced in the extremely intrusive method of policy enforcement constituted by blood alcohol testing and urinalysis.[9] Blood alcohol testing and urinalysis, if implemented unilaterally, would conflict with, and utterly violate, contractually protected rights of the Union's members that were created, and are protected, by the contract's existing, relatively nonintrusive enforcement methodology of visual observation. Three other circuits, like the now-vacated panel opinion, 842 F.2d 794, have decided the issue of methodological difference at the

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determine whether the employee may reasonably be suspected of being impaired or intoxicated, or whether the employee demonstrates signs of habitual drug or alcohol use.

Trained supervision "can detect those who chronically abuse any type of drug and who are impaired at work." *Taylor v. O'Grady*, 669 F.Supp. 1422 (N.D.Ill.1987). Thus, proper instruction of workers and supervisors concerning the signs of impairment and chronic drug use can be an effective method of identifying drug and alcohol abuse in the workplace to enforce a drug and alcohol policy such as Rule G; *but cf. Skinner*, —— U.S. ——, 109 S.Ct. 1402.

[8] Because the program irreconcilably conflicts with the nonintrusive methodology of visual observation, which should itself send this contest to the major dispute process, I do not reach the issue of conflict between the policy contained in Rule G and the revised policy contained in the testing program.

[9] If drug and alcohol policies and enforcement methodologies are fungible, it would seem that implementation of the testing program would at most arguably give rise to a change in working conditions under the statute. Because my position is responsive, I assume *arguendo* that it is possible to hold simultaneously that (1) the methodologies do not conflict; and (2) implementation of the testing methodology would constitute a change in working conditions.

threshold as a question of law.[10] The majority abdicates its responsibility to undertake an identical inquiry. Because the testing program's methodology conflicts with existing terms of the collective bargaining agreement, this dispute does not belong before an adjustment board under any circumstances.

DISCUSSION

I. *Factual Summary*

The panel opinion recounts the facts fully. 842 F.2d at 796-98. This summary outlines the panel's full exposition.

Southwest Airlines Co. ("Southwest") is a common carrier by air subject to the Railway Labor Act. The International Brotherhood of Teamsters ("Union") represents Southwest's mechanics and related employees. Southwest advised the Union on October 16, 1986 that it desired to implement unilaterally a drug and alcohol testing program "'program" or "testing program"). The Union sought to bargain over the program's terms. Southwest refused to bargain and unilaterally attempted to implement the program on January 1, 1987. The Union immediately sought a preliminary injunction. The district granted the injunction on January 9, 1987 (R. 263). *See* 842 F.2d at 798. The panel affirmed the district court on April 21, 1988. *Id.* at 794.

The terms and conditions of a labor contract include both express terms and implied terms created by the past

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[10] *Transport Workers Union v. SEPTA*, 863 F.2d 1110, 1122-24 (3d Cir.1988); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1087, 1092-93 (9th Cir.1988), *cert. pending*, 57 U.S.L.W. 3017 (July 19, 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1102, 1105-07 (9th Cir. 1988); *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016, 1022-23 (8th Cir.1986) (Arnold, J., concurring in part for a unanimous panel).

practices of the parties. *See Detroit & Toledo S.L.R. Co. v. United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 301, 24 L.Ed.2d 325 (1969). The district court found that before Southwest attempted to implement the testing program, Southwest's drug and alcohol policy was contained in Rule G, a unilaterally imposed work rule in which the Union had acquiesced.[11] Rule G prohibits employees from "reporting for or carrying on work while *showing any signs* of the use of intoxicants or knowingly permitting another employee to do so" [sic]. Rule G also prohibits "possession of or drinking any intoxicant or illegal possession or use of illegal or dangerous drugs on company premises or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty."

Before Southwest attempted to implement the program unilaterally, Southwest's sole method of enforcing Rule G had been visual observation of employee behavior. The district court also found that there has been no application of the enforcement method because there is no history of problems with drug or alcohol abuse.

The testing program contains both a revised drug and alcohol policy and an extremely intrusive means of enforcing the revised policy.[12] The revised policy prohibits employees from working with detectable levels of drugs, defines a blood alcohol level of .05% as evidencing alcohol intoxication, and prohibits the use of over-the-counter and prescription drugs that may impair performance. The testing program establishes punishment up to and including discharge for violations of the policy.

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[11] Rule G was promulgated many years ago by the Association of American Railroads. *Skinner*, —— U.S. at ——, 109 S.Ct. at 1407.

[12] The terms of the program are outlined in full at 842 F.2d 797-98. Regulations recently promulgated by the Federal Aviation Administration do not immediately bear on this dispute. *See* note 3 *supra* and note 31 *infra*.

The testing program's intrusive methodology is unprecedented in the parties' bargaining history. The program requires mandatory urine screens and/or blood alcohol tests (1) "[a]fter each vehicular equipment and/or aircraft damage accident *unless* management waives the test" (emphasis in original); (2) whenever Southwest has reasonable suspicion that an employee has violated the program's policy; and (3) "whenever a previously non-physicalled [sic] employee successfully interviews for a position within the company which requires a physical examination." The program also contains testing procedures giving Southwest absolute discretion (1) to determine the testing laboratories to be used; concerning (2) chain-of-custody safeguards; (3) confidentiality; and (4) concerning use of employee releases.

Southwest has attempted to implement a program unilaterally which by its terms provides for urinalysis or blood alcohol testing of *any* company employee at Southwest's discretion "after each vehicular equipment and/or aircraft damage accident." The program, then, requires no suspicion of a particular employee or even group of employees in such circumstances, and therefore gives Southwest absolute discretion after any accident to require any male or female company employee to be subjected to the puncturing of his or her skin in search of blood, and/or to urinate into a container, which must be performed in full view of a witness to prevent the substitution of fraudulent samples.

In addition, the program gives Southwest absolute discretion to provide for specimen chain of custody procedures and to contract with any outside laboratory.[13] Error

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[13] The quality of a testing laboratory determines the accuracy of a testing program. Laboratories are not subject to rigorous licensing requirements. Some are professional. *Skinner*, —— U.S. at ——, 109 S.Ct. at 1409. Some are incompetent. Elaine Shoben, *Test Defamation in the Workplace*, 1988 U. Chi. Legal F. 181, 183 nn. 11 and 12 (discussing articles that describe laboratory incompetence in equipment use and specimen custody procedures).

in either of these areas of discretion, which is inherent in the methodology to a certain degree, would have a dramatic impact on the employees' workaday world. Furthermore, while Southwest's program contains confidentiality provisions, the results of any test are both restricted to and absolutely available to "the Vice President of the respective department and the Review Board." Thus, Southwest has unrestricted access to information having nothing to do with drug or alcohol use that is contained in blood or urine samples to which the company, testing only for drug use, may not otherwise be entitled. Blood and urine samples may disclose the existence of pregnancy, epilepsy and diabetes, *Skinner*, —— U.S. at ——, 109 S.Ct. at 1413, and may even disclose clinical depression. *Id* at 1429 (Marshall, J., dissenting).

II. *Mootness and Abstention.*

I agree with the majority that this case is not moot even though the parties have bargained a new contract without resolving their dispute.[14] My additional discussion also addresses Judge Rubin's alternative suggestion that we should abstain from deciding this case, even assuming it is not moot, based on his belief that we are being manipulated in the parties' bargaining process.

We are not being manipulated by the parties. Private parties impermissibly attempt to manipulate federal courts when, for example, they contract to place jurisdiction in a particular court, which would otherwise have no power to decide a dispute that might arise under the

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[14] Labor contracts commonly have a fairly short duration. The contract in this case was in effect from August 16, 1982 to August 16, 1987 (R. 87). Southwest gave notice of its intent to implement the testing program on October 16, 1986 (R. 186). Southwest implemented the program on January 1, 1987. Thus, only seven and one-half months after Southwest's attempt to implement the program unilaterally, which the Union challenged immediately, the bagaining agreement expired.

parties' contract. In this case, neither party had a reason to bargain over the testing program after the district court issued the injunction.

Southwest will bargain only if coerced by a court or board of adjustment. From the moment this dispute arose, Southwest has refused to bargain over the testing program. Southwest still refuses to concede that it has a statutory duty to bargain over the testing program's terms.

More important, the Union's position results from the incentive structure created by the district court's issuance of the injunction. While the parties were still bound by their original agreement, the district court enjoined Southwest from implementing the testing program "pending both appeal and final disposition" (R. 264). No preexisting legal rule suggested to the parties that the relief explicitly granted by the district court would dissipate before judicial resolution of the labor dispute. Thus, from the moment the district court issued the injunction, the Union reasonably could have expected that its members would continue to be entitled to equitable relief. The Union consequently had no incentive to bargain away other issues in an attempt to bargain over the program's terms with Southwest, which absolutely has refused to bargain anyway. In short, the material incentives governing the parties' behavior offered no reason for a resolution of this particular dispute through bargaining or any other forum outside of the federal court proceeding in equity to which the parties were committed.

Labor disputes are not simply private squabbles. They have a substantial public cast because of pervasive, labyrinthine federal regulation. The district court's predicate role in this case is an integral part of that public cast. We therefore should decide this controversy, although I am quite disturbed by the result.

III. *Mother Hubbard's Kitchen.*

Before analyzing this case, one must understand the distinctive, in some respects puzzling, framework of federal labor regulation under the Railway Labor Act ("RLA"). In the 1920s, railroad unions demonstrated an unparalleled solidarity among American workers before either the rejuvenation of other AFL unions or the conception of the CIO.[15] Concerned with the effect of strikes on the transportation system, Congress passed the RLA in 1926, almost a decade before passage of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("NLRA").[16] The RLA constituted an innovative step

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[15] For a recent discussion of the AFL's resurgence in the 1930s and the role of the CIO, see Christopher Tomlins, *The State and the Unions* (1987). For a traditional account, see Walter Galenson, *The CIO Challenge to the AFL* (1960).

[16] The RLA's remarkable drafting history reflects its unusual character. "The bill was introduced as the product of negotiations and conferences between a representative committee of railroad presidents and a representative committee of railroad labor organization executives, extending over several months, which were concluded with the approval of the bill, respectively, by the Association of Railway Executives and by the executives of 20 railroad labor organizations." H.R.Rep. No. 328, Committee on Interstate and Foreign Commerce to the House of Representatives, 69th Cong., 1st Sess., quoted in *Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 431, 74 L.Ed. 1034 (1930). *See also Elgin, J. & E. Railway Co. v. Burley*, 325 U.S. 711, 753 n. 1, 65 S.Ct. 1282, 1303 n. 1, 89 L.Ed. 1886 (Frankfurter, J., dissenting) (quoting December 25, 1925 message of President Coolidge: "I am informed that the railroad managers and their employees have reached a substantial agreement as to what legislation is necessary to regulate and improve their relationship. Whenever they bring forward such proposals, which seems sufficient to protect the interests of the public, they should be enacted into law"). Cf. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 55 S.Ct. 837, 846, 79 L.Ed 1570 (1935) ("[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficient for the rehabilitation and expansion of their trade or industries?").

in the history of labor relations, embodying a statutory policy of strike prevention and quasi-judicial dispute resolution almost a half century before the Supreme Court's decisions in the Steelworkers trilogy.[17] The RLA was amended in 1934 to provide for binding arbitration of certain disputes. *See Brotherhood of Railway Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 640, 1 L.Ed.2d 622 (1957). In 1936, Congress extended the RLA to common carriers by air with the exception of 45 U.S.C. § 153, which provides for a National Railroad Adjustment Board, the arbitral forum. 45 U.S.C. § 181. Common carriers by air are subject to the provisions of 45 U.S.C. § 184, which provides for an arbitration system separate from the Railroad Adjustment Board.

A. *Major and Minor Disputes.* Unions and employers subject to the RLA primarily encounter two types of disputes arising from the collective bargaining agreements to which they are parties. In *Elgin, J. & E. Railway Co. v. Burley*, 325 U.S. 711, 723-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945), the Supreme Court attached the pregnant labels "major" and "minor" to the two types of disputes. A major dispute results from a party's proposed or unilaterally attempted "*change*" in the terms of a collective bargaining agreement "*affecting rates of pay, rules or working conditions.*" 45 U.S.C. §§ 155, 156 (emphasis added); *Elgin, J. & E. Railway Co. v. Burley*, 325 U.S. 711, 723-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945). Minor disputes grow out of "*grievances*, or out of the *interpretation or application* of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 184 (emphasis added); *Elgin*, 325 U.S. at 723-24, 65 S.Ct. at 1289-90 ("minor disputes,

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[17] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). These cases made clear the federal labor policy favoring arbitration under the NLRA.

. . . involving grievances . . . represent specific maladjustments of a detailed or individual quality"); *see also id.* at 723 n. 16, 65 S.Ct. at 1290 n. 16 (quoting legislative history emphasizing that minor disputes commonly concern grievances).

Whether a dispute is major or minor is not necessarily a result of its importance. A grievance may be quite important, although the dispute is minor, and a proposed change in the agreement may be relatively trivial, although the dispute is major. One's inquiry must always focus on whether a unilateral act or proposal would effect a change in rates of pay, rules or working conditions, because such a unilaterally attempted or proposed change gives rise to a major dispute. See Part IV *infra* and note 4 *supra*.

Major disputes and minor disputes are subject to quite different dispute resolution processes. Minor disputes are resolved through binding arbitration by a board of adjustment. 45 U.S.C. § 184. Parties may not resort to economic weapons while a minor dispute is pending before a board of adjustment. *Brotherhood of Railway Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 640, 1 L.Ed.2d 622 (1957).[18] Major disputes

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[18] The RLA "contains 'no general provision prohibiting a party from acting unilaterally upon its interpretation of the contract pending exhaustion of the grievance procedures,' if indeed the dispute is a 'minor' one involving disagreement on the interpretation of the collective bargaining agreement, as to which strike action interrupting commerce is precluded by the statutory scheme." *International Association of Machinists v. Frontier Airlines*, 664 F.2d 538, 541 (5th Cir.1981) (quoting *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co.*, 447 F.2d 1127, 1132 (5th Cir.1971) (additional citation omitted). Injunctions may be appropriate to preserve the status quo pending arbitration under the RLA in certain limited instances. *See* note 38 *infra; Frontier Airlines*, 664 F.2d at 541.

The Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, bars federal courts from issuing injunctions against unions in labor disputes. Under the NLRA, the Court has carved narrow exceptions out of

result in a judicially-enforced status quo during which time the parties are subject to complex bargaining procedures. 45 U.S.C. §§ 155, 160. These procedures are not binding, however, and once they are exhausted, the parties may resort to their economic weapons without fear of a federal court injunction. *Burlington Northern v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 107 S.Ct. 1841, 1851, 95 L.Ed.2d 381 (1987).[19] Thus, whether a federal court labels a dispute "major" or "minor" when the parties contest the issue will have quite important consequences.

Determining whether a dispute deserves the grand label of "major" or "minor" is sometimes simple but may be a conceptually frustrating task. An employer's proposal to cut wages in half, or a union's proposal to double wages, of course, would constitute a proposed change in the rate of pay and would therefore constitute a major dispute. And most grievances, for example, simply involve straightforward questions concerning whether a contract term should apply to an employee's act for

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the Norris-LaGuardia Act. *See Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). The structure of the RLA demands federal court involvement to preserve the status quo in major disputes pending completion of the mediation process, and in narrow instances pending arbitration. Thus, the Court has held carefully that the Norris-LaGuardia Act "does not deprive [a] federal court of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed 789 (1937), quoted in *Burlington Northern v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 445, 107 S.Ct. 1841, 1851, 95 L.Ed.2d 381, 398 (1987).

[19] The March, 1989 strike of Eastern Airlines by the International Association of Machinists resulted from the exhaustion of procedures in the major dispute process. *See, e.g.*, Daily Labor Report No. 44 (March 8, 1989) (available on LEXIS, Labor Library, Dlabrt file).

which the employer attempts to impose discipline.[20] But other nominally minor disputes may ultimately appear to be major disputes because a definitive interpretation of a contract may seem to be substantively indistinguishable from alteration of the contract. One court has addressed the conceptual difficulty by stating that the "difference on the one hand between the interpretation and application of an existing agreement, and, on the other hand, a change in the original intended basis of agreement is often a question of degree." *Rutland Railway v. BLE*, 307 F.2d 21, 33 (2d Cir.1926), *cert. denied*, 372 U.S. 954, 83 S.Ct. 949, 9 L.Ed.2d 978 (1963).

The courts of appeals have articulated substantively similar standards to decide whether disputes are "major" or "minor" under the RLA scheme when the parties disagree. Under our circuit's standard, the dispute we confront is minor if Southwest's unilateral act is "arguably justified" by the terms of the parties' collective bargaining agreement. *Railway Express Agency v. BRAC*, 437 F.2d 388, 392 (5th Cir.), *cert. denied*, 403 U.S. 919, 91 S.Ct. 2230, 29 L.Ed.2d 696 (1971). The "arguably justified" standard imposes a relatively light burden on Southwest, but the term "arguable" has content. As Judge Tuttle has well-articulated, even colorable

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[20] For example, under a hypothetical collective bargaining agreement, an employer may discipline employees for tardiness. A proviso allows employees to punch their time cards "reasonably late" once a month without fear of discipline. An employee punches in thirty minutes late on the last day of the month. The employee otherwise has been on time all month. The employer attempts to discipline the employee for tardiness. The union grieves the issue, and the parties ultimately appear before the adjustment board.

The hypothetical dispute is minor, because it merely involves the application of the contractual standard to particular facts, and the outcome will ride on the interpretation of the term "reasonable" under the agreement. Such interpretation is an arbitral function. These sorts of disputes arise all the time under collective bargaining agreements, with both the employer's representative—the union —and the employer agreeing that the dispute is minor.

contentions are not equivalent to the arguable contentions giving rise to a minor dispute. *St. Louis, S.F. & T. Railway v. Railroad Yardmasters of America*, 328 F.2d 749, 753 (5th Cir.), *cert. denied*, 377 U.S. 980, 84 S.Ct. 1886, 12 L.Ed.2d 748 (1964).[21]

B. *Duty to Bargain.* Under the Railway Labor Act, employers and Unions have a duty to bargain in good faith over "rates of pay, rules and working conditions." 45 U.S.C. §§ 152, 155, 156; *Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570, 91 S. Ct. 1731, 1735, 29 L.Ed.2d 187 (1971); *Order of Railroad Telegraphers v. Chicago & Nw. Ry.*, 362 U.S. 330, 80 S.Ct. 761, 766, 4 L.Ed.2d 774 (1960). A "change in working conditions governed by the collective agreement . . . [is] by definition . . . a major dispute."

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[21] Under 45 U.S.C. §§ 153, 184, boards of adjustment are the proper fora to interpret the terms of a collective bargaining agreement. But courts, of course, must read a collective bargaining agreement, consider evidence of past practices, and apply rules of construction to characterize a contested dispute as major or minor. At a high level of generality, any conclusion concerning the meaning of language constitutes interpretation. But although a decisionmaker's analysis implicates interpretive choice at a high level of generality, the application of constructive rules in determining whether a dispute is "major" or "minor" does not constitute "interpretation" under the RLA scheme as explained in *Elgin*, 325 U.S. 711, 65 S.Ct. 1282.

Courts face similar analytical difficulties in myriad contexts. *See, e.g., United Steelworkers of America v. Warrior & Gulf*, 363 U.S. 574, 80 S.Ct. 1347, 1353 n. 7, 4 L.Ed.2d 1409 (1960) (in § 301 actions under NLRA, court may not determine substance of arbitrable issue, but must make inquiry to determine at threshold whether dispute is arbitrable). Also, for example, in deciding whether a state law judgment is based on adequate and independent state law grounds, the Supreme Court must analyze a state court decision to reach its conclusion, although the distinction between proper analysis of a state court decision and improper interpretation of a state court's reasoning is sometimes difficult to discern. *See, .g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 22 L.Ed. 429 (1873).

Brotherhood of Locomotive Engineers v. Burlington Northern, 838 F.2d 1087, 1093 (9th Cir. 1988); *Order of Railroad Telegraphers*, 80 S.Ct. at 764-66; *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir.1965); 45 U.S.C. §§ 155, 156. Thus, if Southwest's drug testing program would effect a change in working conditions, Southwest must bargain over the content of the program in the major dispute process, unless the Union has waived its right to bargain.

The majority holds that implementation of the testing program would "effect[] a change in rules and working conditions" over which the employer has a duty to bargain. This dispute, then, is a major dispute by definition. Unless the Union has waived its right to bargain over the change in working conditions, this contest should be routed to the major dispute process.

Both the *en banc* majority and the panel opinion use the phrase "mandatory subject of bargaining" to describe the employer's duty to bargain over proposed changes in working conditions. It should be clear from the panel opinion and the *en banc* majority opinion that the term "mandatory" is a shorthand for the duty to bargain over a unilaterally attempted or proposed change in rates of pay, rules or working conditions under the RLA. As I have discussed, the duty to bargain under the RLA attaches to a change in rates of pay, rules and working conditions unless the parties' agreement properly provides otherwise. *See, e.g., United Industrial Workers*, 351 F.2d 183; *see also, e.g., Order of Railway Telegraphers*, 80 S.Ct. at 764-67 (employer had duty to bargain about job preservation issue despite employer's contention that decision was not bargainable and was within management prerogative); *First National Maintenance*, 101 S.Ct. at 2585 n. 23 (rejecting application of the duty to bargain under the RLA to an NLRA dispute, citing *Order of Railroad Telegraphers*, 80 S.Ct. 761).

The distinction between mandatory and permissive subjects of bargaining is a concept confined to labor relations under the NLRA. Under the NLRA, employers have a duty to bargain only over mandatory subjects of bargaining. *See, e.g., First National Maintenance*, 101 S.Ct. at 2580-81 (employer that terminated contract with customer had duty to bargain only over effects of its decision to terminate and not the decision itself). An employer subject to the NLRA may choose to bargain over permissive subjects of bargaining, but is under no obligation to do so.

IV. *Waiver and the Proper Decisionmaking Forum.*

The majority holds that Southwest has a duty to bargain because implementation of the program would "effect[] a change in rules and working conditions." Because this dispute is major by definition, the majority's *ratio decidendi* is that (1) the Union has arguably made a clear and unmistakable waiver of its right to bargain over changes in contractual terms where the contract is materially silent; (2) the contract is materially silent; and (3) the board of adjustment should decide whether the Union has arguably waived its bargaining rights. Thus raising the term "arguable" to talismanic status, the majority relentlessly Hubbardizes a clause that on its face allows mere interstitial rulemaking into an arguable zipper clause of global scope that cuts only in favor of Southwest. We may have to look at waiver through permanently scratched lenses after today.[22]

No ambiguity suggests "arguable waiver" in this case. The panel was correct in determining the waiver issue as a question of law. In any event, the determination is reserved for a federal court, not an adjustment board. In

[22] For purposes of my discussion in this section, I assume that the contract is materially silent, although I demonstrate in Part V *infra* that it is not silent and the management rights clause should play no role in this case.

this major dispute, the majority's holding concerning waiver is inconsistent with both the statutory scheme and controlling case authority.

The majority also states, amidst a cloud of dicta, that we need not decide whether waiver analysis applies to RLA cases. As I shall discuss below, waiver analysis is a generic rule of construction that certainly applies in RLA cases because there is no alternative except fiat.

We face one controlling question today: whether a federal court or a board of adjustment in these circumstances should decide if the Union has clearly and unmistakably waived its right to bargain. But an answer to the question requires a thorough understanding of the role of waiver in labor contracts because management rights clauses appear in almost every labor contract subject to both the RLA and the NLRA.

A. *What is a Zipper Clause?* Although the majority uses different phraseology, the majority holds that the Union has arguably bargained away a zipper clause to Southwest. The management rights clause in this case provides that

> Employees covered by this Agreement shall be governed by all Company rules, regulations and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement. . . .

Management rights clauses are ubiquitous in labor contracts. A Bureau of National Affairs survey indicates that approximately 99% of all labor contracts contain management rights clauses.[23]

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[23] Donald P. Rothschild, Leroy S. Merrifield & Harry T. Edwards, *Collective Bargaining and Labor Arbitration* 501 (2d Ed.1979) ("BNA's survey of 400 out of 5,000 sample contracts kept on file indicate [sic] that all but 4 contained management (and union) rights provisions" (citation omitted)).

In this case, the majority holds that the Union has arguably waived its right to bargain although nothing in the parties' bargaining history suggests that the Union has waived its rights, and the language of the agreement states nothing specific concerning a waiver of the right to bargain. Absolutely nothing in the record below, apart from the language of the management rights clause itself, suggests waiver. The majority thus holds that unions subject to the RLA have arguably waived their statutory right to bargain in every dispute under the RLA involving a boilerplate management rights clause like this one when the contract is arguably silent in material respects. The majority's holding will sweep widely.[24]

Management rights clauses most commonly allow interstitial rulemaking. Unions are not interested in bargaining over day-to-day management decisions that do not change the conditions of employment in the bargaining unit. But in some cases, management rights clauses may also allow unilateral changes in working conditions by management during the life of the contract when the language of the clause or the parties' bargaining history demonstrates that the union has ceded the right to the employer. In the labor arena, these clauses are often termed "zipper clauses."

A zipper clause receives its name from the image of the self-contained bargain, where the contract contains everything the parties could possibly bargain over in the world, where nothing lies outside the scope of the contract, where neither contractual vacuum nor silence ex-

[24] The majority's treatment of waiver is particularly disturbing because of the uncertain privacy rights of employees subject to collective bargaining agreements, particularly in the area of drug testing. *See Jackson*, 863 F.2d at 119; *Utility Workers*, 852 F.2d at 1086; *see* note 5 *supra; but see* Federal Aviation Administration drug testing regulations, 50 Fed.Reg. 47024 (Nov. 21, 1988); *Skinner*, —— U.S. ——, 109 S.Ct. 1402; note 3 *supra*.

ists. The zipper clause contains all of the content of the parties' bargain that is not otherwise expressed or implied by past practice.

One may interpret a zipper clause in two ways. First, and most logically, a zipper clause may mean that neither party to the agreement may change rates of pay, rules or working conditions during the life of the agreement, unless the contract contains a specific reopener clause or reopener clauses, because express and implied terms solely guide the parties' conduct. *See United Automobile Workers v. NLRB*, 765 F.2d 175, 180 (D.C.Cir.1985) (Edwards, J.). More commonly zipper clauses are interpreted to allow management to act unilaterally to change the conditions of employment. If the management rights clause in this case is a zipper clause, it would carry the latter meaning because it speaks in terms of discretionary management rule-making.

B. *The Rule of Construction.* Deciding whether a Union has clearly and unmistakably waived its statutory bargaining rights in the form of a zipper clause involves the application of a straightforward rule of construction in contract analysis. The majority, for no substantive reason, decides that the rule of construction may not apply under the RLA: "the difference between the [NLRA and RLA] creates a "debatable matter of law" concerning whether waiver analysis even "implies in a case arising under the RLA."

The majority does not and could not reject waiver analysis as a rule of construction under the RLA. Waiver is a generic concept, and its evidentiary predicates have deep roots in the law. "A waiver is a voluntary and intentional relinquishment of a known right or conduct that warrants an inference of such a relinquishment." *FDIC v. Condit*, 861 F.2d 853, 857 (5th Cir.1988) (citations omitted); *see, e.g., St. Louis Electric Light & Power Co. v. Edison General Electric*, 64 F. 997, 1001 (Circuit Court,

E.D.Mo. 1894) ("It is elementary law that, to constitute a waiver, the party upon whom it operates must have full knowledge of all the essential or material facts . . . and the party relying upon such waiver assumes the burden of proof as to the knowledge of the party making the waiver"); *see also, e.g., Cordova v. Hood*, 84 U.S. (17 Wall.) 1, 21 L.Ed. 587, 589 (1873) ("Waiver is a thing of intention as well as of action").

In the labor context, voluntary relinquishment of the statutory right to bargain exists either in a contract's specific language or where the parties' bargaining history suggests that the parties discussed the subject and the Union "consciously yielded" its right to bargain over a proposed change in working conditions. *NL Industries, Inc.*, 220 N.L.R.B. 41, 43-44 (1975), *enforced*, 536 F.2d 786 (8th Cir. 1976). A union's waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); *see also Lingle v. Norge Division of Magic Chef*, —— U.S. ——, 108 S.Ct. 1877, 1883 n. 9, 100 L.Ed.2d 410 (1988). In a sense, the phrase "clear and unmistakable" is superfluous because a waiver in any context must be unambiguously evidenced. The terms "clear and unmistakable" merely make emphatic the inherently strict requirements predicating any conclusion that a party has waived its rights.

Whether the decisionmaker is a federal court or an arbitral forum, someone has to decide if a union has bargained away, in the form of a zipper clause, its statutory right to bargain over proposed changes in working conditions where the contract is materially silent. Implicitly recognizing this in its holding, the majority does not offer an alternative to waiver analysis because no alternative exists. Major disputes arise from unilaterally attempted or proposed changes in working conditions. If a union has bargained away its statutory right to bargain over changes in working conditions, no major disputes may

arise during the life of the contract concerning an employer's unilateral changes in working conditions when the contract is materially silent. Without waiver analysis as a rule of construction, one is left with fiat.

Even if it were possible that a coherent alternative to waiver analysis existed, there would be no reason to treat the RLA and NLRA differently in deciding whether the Union has bargained away a zipper clause. It is true that NLRA principles do not apply uniformly to RLA disputes because the statutory schemes are different. *First National Maintenance*, 101 S.Ct. at 2585 n. 23. But the majority's flow of words points to no material distinction between the Acts that suggests the statutory right to bargain under the RLA is any more subject to waiver than the right to bargain under the NLRA.

The majority notes only general distinctions in the Acts that make no difference in this context. In fact, at least three RLA policies mandate the use of waiver analysis. First, both the content of and the animating spirits behind the two magna cartas of federal labor policy insure the right to bargain. 45 U.S.C. § 152, First; 28 U.S.C. § 158. Second, the statutory duty to bargain is at least as broad under the RLA as it is under the NLRA. *See, e.g., First National Maintenance*, 101 S.Ct. at 2585, n. 23; *see Rockwood & Co.*, 285 N.L.R.B. No. 138 (1987) (National Labor Relations Board held a drug and alcohol testing program a mandatory subject of bargaining under NLRA; opinion of Administrative Law Judge, adopted by Board, rejected employer's argument that Union had waived its right to bargain). And finally, although both statutes were passed to insure industrial peace, only the RLA, not the NLRA, contains a statutory "no-strike" policy. *Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 432, 74 L.Ed. 1034 (1930) ("the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes' "); *Buffalo Forge v. Steel-*

workers, 428 U.S. 397, 96 S.Ct. 3141, 3148, 49 L.Ed.2d 1022 (1976) ("'[T]here is no general federal anti-strike policy [under the NLRA]'" (quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 25, 82 S.Ct. 1328, 1344, 8 L.Ed.2d 440 (Brennan, J., dissenting))). Yet the RLA carefully preserves a party's ultimate access to its strike rights in major disputes. 45 U.S.C. §§ 155, 156, 160; *Elgin*, 325 U.S. at 723-24, 65 S.Ct. at 1289-90. Thus, we should be particularly wary in RLA cases of claims that a union has waived its already limited access to economic weapons.

C. *The Panel Properly Decided the Waiver Issue.* Waiver analysis must apply to RLA disputes. The majority's *ratio decidendi* appears in its holding that "we are not squarely presented at this time with the question of how the 'clear and unmistakable' rule applies to RLA cases [because even assuming it does] . . . the construction [of the management rights clause] proposed by Southwest satisfies the minimal burden of arguably being a clear and unmistakable waiver" of the Union's right to bargain.[25] According to the majority's reasoning, the Union's "arguable waiver" transforms a dispute that is by definition major into a so-called minor dispute appropriate for the arbitral forum.

The majority's holding is disturbing because it treats only casually the uncertain privacy rights of employees in an area of law riddled with waiver and preemption difficulties.[26] Moreover, the majority's holding fails to make explicit the severe consequences of sending this otherwise major dispute to the arbitral forum. The ma-

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[25] I reiterate that the management rights clause, whatever it means, only plays a role in this case if the contract is at least arguably silent in material respects. The majority assumes that the contract's material silence is "undeniable fact." I assume *arguendo* that the contract is arguably silent.

[26] *See* notes 5 and 24 *supra* and note 38 *infra; but see* note 3 *supra*.

jority leaves it to the adjustment board to decide the fate of employee strike rights in an otherwise major dispute, thus at best temporarily denying and perhaps erasing the Union's access to economic weapons.

The majority's opinion contains three fatal analytical errors. It ignores the unambiguous facts of this case; it is inconsistent with the statutory scheme; and it is inconsistent with RLA case authority. The panel concluded correctly that the union has not waived anything, arguably or otherwise, and that this controversy should be routed to the major dispute process.

1. *Question of Law.* The "arguably justified" standard concerns the relationship between the content of contractual terms and a party's disputed act. The standard should not apply to questions of law that are brought to bear on the terms of the contract in an otherwise major dispute. A federal court should determine in the first instance whether a party has waived its statutory bargaining rights under the RLA.

The majority's holding conflicts with the statutory scheme. As I have discussed, the RLA provides for two types of dispute resolution. Disputes over proposed changes in working conditions are major disputes—the types of disputes from which strikes ordinarily result. Major disputes are subject to a complex mediation process, at the end of which the parties may resort to their economic weapons. Minor disputes are often grievances, and concern the proper application or interpretation of agreements. Boards of adjustment decide minor disputes. Parties may not resort to the use of economic weapons in minor disputes.

When a party contests which type of dispute the employer and union confront, the party may sue for an injunction in federal court, invoking the federal question jurisdiction of 28 U.S.C. § 1331, to preserve the status quo

if the court determines that the dispute is major.[27] After analyzing the parties' contentions, the federal court routes the dispute to one of the two channels of dispute resolution.

The majority improperly places in an adjustment board the power to determine whether a Union has waived its right to bargain (and ultimately its access to economic weapons) over an issue that is by definition a major dispute. The majority's holding gives one channel of the dispute resolution process (the adjustment board) the power to decide whether the alternative channel (the Mediation Board process that may ultimately lead to use of economic weapons) is the appropriate forum for dispute resolution. But federal courts, not adjustment boards, are at the apex of the triangle in contested forum cases because unlike adjustment boards, federal courts are relative strangers to the actual dispute resolution process.

The federal interest in ensuring the proper relationship between courts and arbitrators further demonstrates the majority's error. A court sends a signal concerning the merits of an already determined major dispute when it routes the dispute to an adjustment board, which decides minor disputes, to determine whether a union has waived its right to bargain. As the Supreme Court has noted in an analogous context, "[I]t is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views. . . ." *Buffalo Forge*, 96 S.Ct. at 3150.

The "judicial influence" argument may appear to prove too much. It does not. Although courts send disputes to adjustment boards as "minor," which may imply judicial views on the merits, the difference between such common cases and this case is that minor disputes *belong* before

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[27] In certain circumstances, an injunction may be appropriate in minor disputes. *See* note 38, *infra*.

an adjustment board. The adjustment board may correct judicial error in characterizing a dispute as "minor" by nevertheless concluding that a duty to bargain exists because the proposed issue or contested unilateral act constitutes a change in rates of pay, rules or working conditions. In contrast, the majority in this case has already concluded as a matter of law that the dispute is major absent waiver of the right to bargain. The most that the adjustment board may do is ratify the majority's legal conclusion.

2. *No Ambiguity.* Even assuming the majority is correct in applying the "arguably justified" standard to waiver analysis, its application is incoherent in this case because no material evidence supports a finding of waiver, arguable or otherwise. Southwest's waiver argument, which depends solely on the language of the management rights clause, is not even colorable, much less arguable. Absolutely nothing in the record, apart from the language of the management rights clause itself, supports a determination that the Union has even arguably waived its right to bargain. *See St. Louis, S.F. & T. Railway*, 328 F.2d at 753 ("arguable" means more than "merely fictitious" or even 'colorable") (Tuttle, J.).

Ambiguity, not clarity or unmistakability, gives rise to arguability. Even assuming that a party may "arguably waive" a known right where the factual context offers conflicting or uncertain evidence, this case, as I have probably stated emphatically enough, involves nothing more than the language of a common management rights clause. Because we have been presented with the material information necessary to decide the question of law, we confront no potential ambiguity resulting from any evidence or contract language, and neither would an arbitrator. In this context, a board of adjustment would have no discretion to decide the issue differently from this court because both decisionmakers would be presented with identical, unambiguous information. Mother Hub-

bard cannot be arguably pregnant after application of an ultrasound test.

It is instructive to compare the language of the management rights clause in this case with the management rights clause rejected by the court in a controlling case in this circuit, *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 187 n. 18 (5th Cir.1965), and with the management rights clause rejected by the court in *Transport Workers Union v. SEPTA*, 863 F.2d 1110, 1124 (3d Cir.1988). I discuss both of these cases immediately below.[28]

3. *Case Authority.* The majority's cavalier approach to waiver not only conflicts with the statutory scheme, the facts of this case, and reasoned analysis, it is inconsistent with RLA authority both in this circuit and in the Third Circuit. The law of this circuit supports the Union's position, although the majority would have one believe that management prerogative is enshrined in our precedent. Failing to cite a controlling case, *United Industrial Workers*, 351 F.2d 183 (5th Cir.1965), the majority misplaces its reliance on *Railway Express Agency v. BRAC*, 437 F.2d 388 (5th Cir. 1971), *cert. denied*, 403 U.S. 919, 91 S.Ct. 2230, 29 L.Ed.2d 696 (1972). The court in *United Industrial Workers* completely rejected a management rights argument in a case involving a management rights clause with language explicitly favoring employer discretion in the area at issue. *Railway Express Agency v. BRAC* is distinguishable because past practices, not the management rights clause, determined the result. In

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[28] I note that it is not difficult for two parties, bargaining at arm's length, to include an unambiguous zipper clause in their contract stating, for example, that "The Union has waived its right to bargain over changes in rates of pay, rules and working conditions unless a change would conflict with an existing express or implied term of the agreement." If an employer wishes to exercise such unfettered discretion an employer should insist on such language during bargaining.

Railway Express, unlike in this case, the employer's unilateral act was arguably justified by prior union acquiescence.

In *United Industrial Workers*, 351 F.2d 183 (5th Cir. 1965), a union served notice on a dock owner and operator that it wished to open an existing contract for negotiation concerning a grain elevator facility that employed the union's members. On the same day, the employer advised the union that it would not negotiate, "presumably" because it had leased the elevator facility to a third party, and posted a notice that all employees would be permanently laid off. 351 F.2d at 185. The court, in an opinion by Judge Brown, held that the dispute was major and that the employer had to bargain before it could put the lease into effect.

The court rejected all of the employer's arguments that the contract's terms made the dispute a minor one. In particular, the court rejected the employer's management rights argument. 351 F.2d at 189. The contract's broad management rights clause provided that "The management of the [grain] elevator and the direction of the working force, including, but not limited to the right to . . . increase and decrease the working force . . . are vested exclusively in the carrier." 351 F.2d at 187 n. 18.

The court in *United Industrial Workers* did not infer waiver, arguable or otherwise, even when the language of the management rights clause might appear to have given rise to an arguable issue. The *United Industrial Workers* court rejected a clause that on its face gave management the right to decrease the workforce in a case that *concerned* layoffs. The clause in this case is quite less specific than the unspecific management rights clause in *United Industrial Workers*. In addition, the *United Industrial Workers* court emphasized that an employer's duty to bargain is extremely broad in the RLA context, relying on *Order of Railroad Telegraphers*, 362 U.S. 330, 80 S.Ct. 761. 351 F.2d at 191.

On a second appeal in the same case, another panel of this circuit emphatically noted the import of the panel's holding on the first appeal: "[T]he [carrier's] assignment of error in its cross appeal . . . bearing on the construction to be given the 'management rights clause' of the bargaining agreement, is without merit. The district court correctly rejected this as irrelevant in view of this Court's prior opinion." *United Industrial Workers*, 368 F.2d 412, 414 (5th Cir.1966).

The majority's reliance on *Railway Express Agency v. BRAC*, 437 F.2d 388 (5th Cir.1971), is misplaced because the decision was controlled by prior union acquiescence in unilateral employer work transfers. In *Railway Express*, the employer unilaterally contracted out to an airline a portion of the employer's air express transfer work that the employees had previously handled at an airport. 437 F.2d at 390. The local union challenged the act, contending that it violated the parties' collective bargaining agreement. The court held that the dispute was minor and routed the dispute to the arbitral forum.

As the majority correctly states, Judge Bell's opinion for the panel cites the management rights clause in the collective bargaining agreement. The clause reserved "the right of management to determine methods of operation and the utilization of the working forces. . . ." 437 F.2d at 392. But the decision did not result from a holding that the clause constituted an arguable waiver of the right to bargain.

The result in *Railway Express* was controlled by a "state of facts," not by the agreement's management rights clause. *Id. In Railway Express*, "there [was] an undisputed work history of such unilateral transfers of work with no apparent objection from the union." *Id.* In other words, the past practices of the parties controlled the result. The Union had acquiesced in the types of work transfers giving rise to the dispute. Furthermore, the certified bargaining agent was BRAC (the In-

ternational), which agreed that the dispute was minor and wired the local that the strikers should return to work immediately. *Id.* at 393.

In this case, the Union has not acquiesced in the intrusive and unprecedented enforcement methodology constituted by the drug testing program. Unlike in *Railway Express*, no "state of facts" in this case suggests that unilateral implementation of the testing program gives rise to a minor dispute, arguably justified by past practice or any other term of the contract.

The majority states that the *Railway Express* court "relied heavily" on the Second Circuit's decision in *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir.1962), and the majority quotes the *Rutland* decision at length. *Rutland* is inapposite for two reasons. As I have demonstrated, a "state of facts" controlled the court's decision in *Railway Express*. 437 F.2d at 392. Even if *Rutland* supported the type of Mother Hubbard argument that the majority makes in this case, it would not be persuasive in this circuit because *Railway Express* was controlled by prior union acquiescence, and *United Industrial Workers*, 351 F.2d 183, 368 F.2d 412, is the controlling law in this circuit.

Rutland does not support the majority's argument in any event. *Rutland* includes broad language concerning management prerogative, but does not engage in Hubbardizing. *Rutland* involved an employer's unilateral attempt to make changes on train runs. The court held that the dispute was minor because several specific provisions concerning train runs, 307 F.2d at 35-36, and the "prior conduct of the parties," *id.* at 36, arguably justified the employer's unilateral act. Unlike in this case, the contract in *Rutland* required arbitral interpretation.

The majority's decision also clashes with the law of the Third Circuit, which explicitly has rejected a Mother

Hubard argument in a drug testing case, the material portion of which is similar to the case the majority decides today. *Transport Workers Union v. SEPTA*, 863 F.2d 1110, 1122-24 (3d Cir.1988). In *Transport Workers*, the employer relied on the language of a management rights clause in an attempt to justify its unilateral implementation of a drug testing program. The clause provided that the employer retained " 'all management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement.' " *Id.* at 1124. The court rejected the employer's argument "that it reserved its right to modify its drug testing policies through [the] 'management functions' clause," holding that "such broad management rights clauses cannot serve to exempt management from the RLA prohibition against unilateral institution of changes in rules and working conditions." *Id.* Unlike the majority, the Third Circuit does not believe that unspecific language in a management rights clause supports even a colorable contention that a union arguably has made a clear and unmistakable waiver of its right to bargain.[29]

D. *Summary.* Implementation of the testing program, as the majority holds, would "effect[] a change in rules and working conditions." This is therefore a major dispute. The panel correctly determined that the Union did not waive its statutory right to bargain, and correctly held that this contest should be routed to the major dispute process.

Waiver analysis must apply in RLA disputes. Whether a Union has waived its statutory right to bargain is a

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[29] *See also Transport Workers v. Eastern Airlines*, 695 F.2d 668, 673 n. 3 (2d Cir.1982) (Newman, J.) (criticizing the RLA's major/minor dispute scheme as not "entirely satisfactory, particularly when courts are interpreting agreements that include general management rights clauses, which arguably can be enlisted to support any action taken by management that is not explicitly in conflict with a contractual right of the union" (citations omitted)).

question of law for a federal court, not a board of adjustment. Even if the "arguably justified" standard applies to waiver issues, there is no waiver in this case, arguable or otherwise, as a matter of law, because absolutely nothing in the record below suggests waiver. Not least important, the majority's opinion both ignores controlling law of this circuit and is inconsistent with the law of the Third Circuit.

Because the Union has not even arguably waived its statutory right to bargain over the program, this contest should be subject to the procedures mandated by 45 U.S.C. §§ 155, 156, 160. In the major dispute process, a union has a right to bargain in the context of a judicially-enforced status quo. If the parties reach impasse and the President does not intervene, 45 U.S.C. § 160, they may resort to their economic weapons without fear of a federal court injunction. *Burlington Northern*, 481 U.S. at 445-53, 107 S.Ct. at 1851-55, 95 L.Ed.2d at 398-403.

V. *The Management Rights Clause Does Not Control This Case.*

A.

Waiver analysis plays no role in this case if the management rights clause does not apply by its own terms. The clause does not apply if a unilaterally promulgated "rule, regulation or order" is "in conflict with the terms and conditions of [the] Agreement." That is, the clause only applies, whatever it means, if the contract is materially silent. The contract is not materially silent, although I have assumed it is silent in Part IV *supra* to respond to the majority's holding in this case.

The majority states that "the following facts cannot be denied:" (1) the testing program is a rule, regulation or order within the clause's meaning; and (2) the program does not conflict with the terms of the contract. Neither of the majority's interpretations is a fact, although I

agree that the testing program is at least arguably a rule, regulation or order within the clause's meaning.

I deny that the testing program does not conflict with the terms of the contract. And even if the majority stated that the management rights clause applies because the program "arguably" does not conflict with the terms of the contract, the majority would be in error. The methodology of blood alcohol testing and urinalysis used to enforce the testing program's policy squarely conflicts with the contract's existing enforcement methodology of visual observation.[30] Under the parties' bargain, the employees enjoy (1) contractually protected privacy expectations that they will not become the subjects of discipline absent individualized suspicion; (2) contractually protected expectations of bodily and informational privacy; and (3) contractually protected expectations that they will not suffer unwarranted discipline such as wrongful discharge as a result of erroneous enforcement, or defamation resulting from dissemination of inaccurate test results. The testing program's methodology conflicts with the contract because it violates all of these expectations. The program allows Southwest to puncture any company employee's skin, and/or fully observe any employee, male or female, urinate after any accident at Southwest's absolute discretion, regardless of the employee's relationship to the accident. Nothing in the contract remotely justifies such methods of policy enforcement.[31]

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[30] For explanation of the phrase "visual observation," see note 7 *supra*.

[31] As I state above in note 3, the Federal Aviation Administration drug testing regulations, 50 Fed.Reg. 47024 (Nov. 21, 1988) are extensive and will undoubtedly remove some aspects of Southwest's program from the bargaining table, if the parties reach it. Some aspects of the program would remain negotiable, however, and therefore the FAA regulations, even assuming they are entirely constitutional, *see Skinner*, —— U.S. ——, 109 S.Ct. 1402, do not moot this case. Because the FAA regulations are not material in these circumstances to determining under the contract and the

The Union has waived nothing, assuming that the management rights clause applies and the contract is materially silent. *See* Part IV *supra*. But the contract is not silent. Methods of enforcement matter. If the method of visual observation, on the one hand, and blood alcohol testing and urinalysis, on the other, were entirely unrelated, silence might play a role in this case. Both types of enforcement methods, however, serve the same purpose: prevention of drug and alcohol abuse in this workplace. Moreover, the methods are integrally related for another reason: Southwest's testing program *includes* visual observation as one of its elements. Yet the majority states nothting substantive about the radically differing contents of the methods.

Treating all enforcement methodologies as fungible, the majority fails to make the type of threshold inquiry that controlled the panel's decision in this case and has controlled similar cases in the Third, Eighth and Ninth Circuits:[32] has the Union arguably acquiesced in the methods of a testing program that (a) is not limited to particularized suspicion; (b) invades bodily privacy interests; (c) invades informational privacy interests; and (d) invades interests in avoiding unwarranted discipline and potential damage to reputation?

If the differences between the methodologies of blood alcohol testing and urinalysis, on the one hand, and visual observation, on the other, were even arguably fungible,

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RLA the bargaining rights of the parties, they are not material to our immediate inquiry.

[32] *Transport Workers Union, v. SEPTA*, 863 F.2d 1110, 1122-24 (3d Cir.1988); *Brotherhood of Locomotive Engineers v. Burlington Northern*, 838 F.2d 1102, 1105-07 (9th Cir.1988); *Brotherhood of Locomotive Engineers*, 838 F.2d 1087, 1092-93 (9th Cir.1988), *cert. pending*, 57 U.S.L.W. 3017 (July 19, 1988); *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016, 1022-25 (8th Cir.1986). The majority does not mention even one of these cases.

the majority would not have to rely on the management rights clause to reach its result. The majority could rely solely on the Union's prior acquiescence in the visual observation methodology to hold that the contract arguably justifies Union acquiescence in blood alcohol testing and urinalysis. Because the majority relies on the management rights clause for its holding the majority implicitly admits the obvious: acquiescence in an enforcement methodology of visual observation says nothing about acquiescence in an enforcement methodology of urinalysis and blood alcohol testing.

The district court found that Rule G is the contract's drug and alcohol policy, and that visual observation is the parties' contemplated method of Rule G enforcement under the contract. In two statements, the majority confuses policy and methodology, and ignores that methodological differences may give rise to a conflict. First, the majority states that "the testing program is more extensive than Rule G." Rule G is simply a policy, and the testing program contains both a new policy *and* an unprecedented enforcement methodology. Second, the majority states that Rule G's existence "demonstrates a history under the agreement of unilaterally promulgating *rules supporting* a drug and alcohol policy" (emphasis added). Policies are contained in rules, not in the air.[33] And if by "rules" the majority means methods of enforcement, then the Union's sensible acquiescence in Rule G should suffice to decide this case under the majority's approach. As I have stated, however, the majority implicitly admits that methodological differences matter by basing its holding on the management rights clause.[34]

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[33] Cf. *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (1928) (Cardoza, J.) (" 'Proof of negligence in the air, so to speak, will not do'," quoting Pollock, Torts, p. 455 [11th Ed.]), quoted in R. Epstein, C. Gregory, H. Kalven, *Cases and Materials on Torts* 323 (4th ed.).

[34] If Rule G and the method of visual observation arguably justify unilateral implementation of the testing program, then im-

B.

Methodologies may conflict because employee expectations are substantively part of the contractual terms *creating* the expectations. When the terms change because of unilateral employer actions, such employee expectations are violated.

Collective bargaining between these parties has resulted in a nonintrusive drug and alcohol enforcement method of visual observation because the Union has acquiesced in the method of visual observation through past practices. The contractual existence of the visual observation methodology creates (1) baseline contractual expectations that an employee will only be subject to discipline for violating a drug and alcohol policy when he or she is the focus of individualized suspicion; (2) baseline contractual expectations of bodily and informational privacy; and (3) baseline contractual expectations that employees will not be subject to unwarranted discipline, such as wrongful discharge, or defamation, for errors resulting from the enforcement of a drug and alcohol policy (visual observation is relatively error-free).[35] Because blood alcohol testing and urinalysis violate all of these contractually-protected expectations, the testing program's methodology conflicts with existing contractual terms and the management rights clause should play no role in this case.

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plementation of the program, it would seem, would at best arguably effect a change in rules and working conditions within the meaning of 45 U.S.C. §§ 155, 156.

[35] I do not suggest that employees' contractual expectations of privacy, which result from the bargaining between their employer and representative, should supplant or alter the scope of employees' common law privacy rights, statutory privacy rights, and any applicable state or federal constitutional privacy rights. As I note above and below, however, *see* notes 5, 24 and 38, in the view of some courts, the only privacy rights that unionized employees may have, at least in the drug testing arena, may be contained in the collective bargaining agreements to which the employees are subject. *Jackson*, 863 F.2d at 119; *Utility Workers*, 852 F.2d at 1086. *See also* note 3 *supra*.

I emphasize that we are in this case considering only the right to bargain. If the parties reach the bargaining table, the Union may agree in bargaining to the stringent enforcement techniques. But it may at the same time urge the narrowing of coverage or perhaps specific safeguards as to the quality of the laboratory work or the confidentiality of the test results. The point is, in all of this discussion in this entire case, we are considering only the rights of the employees to be heard through their Union by bargaining about these complicated issues.

1. *Individualized Suspicion.* Under the parties' agreement, employees have been subject to discipline for violating a drug and alcohol policy only when they have been particularly suspected of wrongdoing.[36] Southwest's testing program, if implemented, would dramatically upset the employees' contractually protected privacy expectations concerning individualized suspicion. The program allows the company to puncture the skin and/or observe the urination of any company employee after any vehicular accident at Southwest's discretion, regardless of the employee's relationship to the accident. Under the terms of Southwest's testing program, if two mechanics collide while driving maintenance vehicles, a ticketing agent could be subjected to the program's testing methods without any basis for suspicion.

Every other court addressing the issue we face, in a Rule G or similar enforcement context, has determined that the issue of an employee's contractual privacy interest in individualized suspicion is a critical factor in deciding the outcome of a major/minor dispute issue under a collective bargaining agreement. The majority does not cite one of these decisions, much less attempt to distinguish them. *Transport Workers Union*, 863 F.2d at 1122-24 (unilateral implementation of random drug testing

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[36] There is no history of Rule G enforcement in this case because there is no history of drug or alcohol abuse among the Union's members.

changes the terms of a contract, and is therefore a major dispute, when employees had acquiesced in drug testing only on reasonable suspicion); *BLE v. Burlington Northern*, 838 F.2d at 1105-07 (unilateral attempt to impose random canine sniffs constituted a major dispute because agreement, like the one in this case, required individualized suspicion in the form of "objective facts demonstrating prior use"); *BLE v. Burlington Northern*, 883 F.2d at 1092 (unilateral attempt to impose post-incident testing of entire train crew gave rise to major dispute when agreement had required individualized suspicion); *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d at 1023 (Arnold, J., for a unanimous court on the issue) (unilateral attempt to impose post-incident testing of train crews gave rise to a minor dispute, but in part only because employer's policy limited testing to individuals who could have been responsible for the accident).

The analytical framework applied in these cases should control this contest. As the panel opinion demonstrated, this case involves prior acquiescence in policy enforcement only when suspicion is individualized—which is inherent in the very methodology of visual observation. Southwest's program sweeps more widely than anything the Third, Eighth and Ninth Circuits have permitted in similar cases. The conflict between the enforcement methods in this case, resulting from the differences in requisite suspicion, alone makes the management rights clause inapplicable and the arbitral forum inappropriate.

2. *Contractual Privacy Interests.* The majority also ignores the importance of employees' contractually protected expectations of privacy. Privacy interests, which inhere in the contract's enforcement methodology term, take two forms: bodily privacy and informational privacy. Blood alcohol testing and urinalysis conflict with the contract because they violate the expectations created

by the minimally intrusive methodology of visual observation.

(a) *Bodily Privacy.* Blood alcohol testing and urinalysis implicate two distinct but related interests in bodily privacy.

i. *Urinalysis.* Supervisors must directly witness the act of urination to prevent the substitution of fraudulent urine samples.[37] Southwest's program gives the company absolute discretion to utilize this effective method.

Urination with a witness is, one might say, inconsistent with the traditional elimination of urine as a solitary activity. "There are few activities in our society more personal or private than the passing of urine." *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987) (Rubin, J.), *affirmed in part and reversed in part*, —— U.S. ——, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). "In our culture the excretionary functions are shielded by more or less absolute privacy. . . ." Charles Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968); *Skinner*, —— U.S. at ——, 109 S.Ct. at 1413. Needless to say, supervisiorial witnessing of urination conflicts with the method of visual observation of employee behavior in the workplace, which is the existing method of policy enforcement under the contract.

ii. *Blood Testing.* Blood alcohol testing requires the literal violation of the body. Puncturing flesh in search of blood violates the contractually protected privacy ex-

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[37] *See Skinner.* —— U.S. —— n. 8, 109 S.Ct. at 1428 n. 8 (Marshall, J., dissenting), quoting the Federal Railroad Administration regulations at 50 Fed.Reg. 31555 (1985) ("observation is the most effective means of ensuring that the sample is that of the employee and has not been diluted"); *id.* at ————, 109 S.Ct. at 1428 (citing an FRA Field Manual instructing supervisors monitoring urination that "railroad workers must provide urine samples *under direct observation* by the physician/technician" (emphasis in Justice Marshall's opinion)).

pectation created by the noninstrusive methodology of visual observation. In the constitutional context, the Supreme Court has well-recognized the serious intrusions occasioned by blood testing. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *Skinner*, —— U.S. at ——, 109 S.Ct. 1412. Blood testing does not become any less invasive when, if imposed unilaterally, it violates the terms of a collective bargaining agreement.

(b) *Informational Privacy.* The employees also have a legitimate contractual privacy interest in not disclosing private medical information, in the form of a blood or urine sample, to which an employer is not otherwise entitled. The method of visual observation creates and guarantees this contractual privacy expectation. Blood alcohol testing and urinalysis fundamentally conflict with employees' protected interests in nondisclosure of private medical information.

An employer testing only for the presence of intoxicants has no legitimate interest in knowing, for example, whether an employee is pregnant, epileptic, diabetic or clinically depressed. Blood and urine samples contain such information. *Skinner*, —— U.S. at ——, 109 S.Ct. at 1413; *id. at* ——, 109 S.Ct. at 1429 (Marshall, J., dissenting); *see* Comment, *Meeting the Challenge to Privacy Rights by Employer Drug Testing: The Right of Nondisclosure*, 1988 U.Chi.Legal F. 213. Southwest's program gives the departmental Vice Presidents absolute discretionary access to all information contained in test results. Unlike blood alcohol testing and urinalysis, visual observation as a method of enforcement does not tread on any such informational privacy interest.

3. *Unwanted Discipline and Defamation.* Southwest's testing program provides for punishment up to and including discharge for violations of the program's policy. The employees have a contractually protected interest in avoiding unwarranted discipline, such as wrongful dis-

charge, and potential defamation caused by the dissemination of inaccurate test results. Supervisorial visual observation is relatively error-free because of the individualization and immediacy of the scrutiny. *See* note 7 *supra*. In contrast, urinalysis, at least, "inherently ha[s] some rate of inaccuracy." Elaine Shoben, *Test Defamation in the Workplace*, 1988 U.Cchi.Legal F. 181, 182, *citing*, Council on Scientific Affairs in Scientific Issues in Drug Testing, 257 Journal of the American Medical Association 3110 (1987). Both blood alcohol testing and urinalysis may result in errors leading to discipline because of faulty chains of custody and incompetent or erroneous laboratory analysis. These problems are not merely theoretical. *Shoben*, 1988 U.Chi.Legal F. at 183 nn. 11 and 12. And leaks of inaccurate confidential information may result in severe reputational damage. *See generally id.*

Southwest's testing program implicates all of the problems associated with blood alcohol testing and urinalysis. Moreover, the program gives Southwest absolute discretion to determine the laboratories to be used, the chain of custody procedures; and the procedures to ensure confidentiality. Thus, in addition to the inherent problems in the methodology, nothing in the program guarantees that Southwest will accurately determine the appropriate levels of care in determining whether and how to minimize such errors. See note 13 *supra*, concerning the problems of laboratory incompetence and faulty chains of custody.

C.

The bargain between Southwest and the Union does not arguably justify such sweeping changes in the conditions of the workaday world. The employees, through their Union, contracted for significantly more protection by acquiescing in Rule G and its enforcement method of visual observation. The testing program irreconcilably conflicts with the contract because its enforcement meth-

ods violently upset employees' contractually protected expectations. Because the management rights clause should not control this case, the board of adjustment is not the proper forum to resolve any aspect of this dispute.

The majority routes this dispute to the board of adjudgment, which may determine that the Union has not waived its right to bargain. Southwest may have to bargain over the terms of this program after all. I certainly hope this correct result is ultimately reached, one way or another. If Southwest's testing regime were implemented as it stands, employees would labor away in their workaday world, well-aware of Southwest's far-reaching discretion. Employees would be particularly well-aware of the invasions of privacy and unwarranted discipline to which the exercise of Southwest's discretion could lead under the program. The majority rewrites the parties' bargain, and denies—temporarily at least—the Union's right to bargain in a major dispute. Even a temporary denial of the right to bargain, however, is not justified by the parties' contract or the Railway Labor Act.[38]

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[38] This is clearly a major dispute, and the Union has not waived anything, arguably or otherwise. As a consequence, we should affirm the district court's status quo injunction pending the completion of the mediation process. 45 U.S.C. §§ 155, 156, 160.

Because this contest should be routed to the major dispute process, I shall not fully discuss the majority's holding that the district court abused its discretion by enjoining the testing program, under the district court's alternative assumption that this is a minor dispute. I note, however, that injunctions may be appropriate in minor disputes "to prevent the carrier from disrupting the status quo when doing so would result in irreparable injury of a magnitude that would render a decision in favor of the union[] virtually meaningless." *International Association of Machinists v. Frontier Airlines*, 664 F.2d 538, 542 (5th Cir.1981). Cf. *United Steelworkers v. United States Steel*, 1989 WL30697, 1989 U.S. Dist. LEXIS 3246 (March 29, 1989) (preliminarily enjoining implementation of a drug testing program).

Potentially irreparable injuries to employees could result from unilateral implementation of the testing program pending arbitra-

Conclusion

In this intricately structured arena of labor relations, the need for lengthy discussion has surely become apparent. Still, "a few words will suffice to relate my essential discovery. . . . So here goes." [39]

This case concerns neither the wisdom nor propriety of drug testing. Moreover, this case does not concern the relationship between employee privacy rights and employer or social interests in safety, efficiency or property. This case simply concerns whether, in these circumstances, the Union's members have a voice under the parties' agreement.

As the panel held, and as the majority holds, implementation of the testing program would "effect[] a change in rules and working conditions." In this major

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tion, particularly if the adjustment board ultimately determines that the Union has a right to bargain over the program's terms. Such potential injuries could take the form of invasions of privacy, wrongful discharge or defamation resulting from dissemination of inaccurate test results.

State tort claims for injuries caused by an employer pending arbitration, where the Union has not spoken under the contract, may not be fully remediable under the contract and Railway Labor Act because the claims may be preempted. *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Magnuson v. Burlington Northern*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978). At least when the Union has bargained over the program's terms, the employees receive some contractual protections—or something else in return for bargaining away privacy protection under the contract—to replace (in theory) the loss of state law rights. Cf. *Utility Workers*, 852 F.2d at 1086; *Jackson*, 863 F.2d at 119. Thus, whether the district court abused its discretion is an exceedingly complicated question that the majority fails to address adequately. *But see* note 3 *supra*.

[39] Albert Camus, *The Fall* (1956) (Vintage Books, p. 69, tr. Justin O'Brien).

dispute, the Union has waived nothing, arguably or otherwise, in the form of a zipper clause. Because the majority's Hubbardizing is inappropriate, and because the board of adjustment has no proper role to play in this contest. I dissent.

ALVIN B. RUBIN, Circuit Judge, dissenting:

The case presented to the district court is now moot. The collective bargaining agreement between the parties which served as the sole basis for the suit and the injunction, has expired. Even though the injunction issued by the district court is not expressly limited to the period during which the agreement was in force, the only basis for it was, as the majority opinion notes, that "the implementation of the program was not arguably justified under the terms of the collective bargaining agreement." Once the agreement had ended there was no predicate for enjoining management action, and the injunction could no longer be enforced.

The sole basis then on which a federal court might continue to assert jurisdiction is that the parties have now negotiated a new agreement and, in order to secure a judicial opinion, have failed to clarify the terms of their contract or even, we were informed in oral argument, to bargain in an attempt to do so. Instead, they ask us to interpret the new contract, saying, in effect, "we would like to put before you some contract language about which we do not wish to negotiate and have you tell us what it means." We should not allow ourselves, sitting en banc, thus to be drawn into a dispute calculatedly kept alive solely so that we could resolve it.

The majority concedes that the original dispute is indeed moot, but justifies asserting jurisdiction on the ground that the dispute is capable of repetition yet evading review. Judge Goldberg's dissent also adopts that view. I cannot agree. Any contract that has expired may be repeated; that is no reason to interpret contracts that are no longer in effect. I am unable to understand, furthermore, how a dispute that has actually been repeated, and that could be reviewed by the simple expedient of applying for an injunction based on the current contract, could possibly be capable of repetition yet evading review.

So long as a contract is not inherently short-lived, review is easily obtained, and, if it is inherently short-lived, ambiguities should, absent extraordinary circumstances, be clarified by the parties, not by the courts.

The majority concludes, however, that labor litigation is so different from other litigation that it mandates a different interpretation of the constitutional provision restricting judicial action to "cases and controversies." [1] I do not believe that labor litigation stands a constitutional world apart. The three cases relied on by the majority present questions entirely different from the issue sought to be kept alive here. They adopt completely conventional interpretations of the constitutional requirement, and do not justify asserting jurisdiction in this case.

In *Super Tire Engineering Company v. McCorkle*,[2] the first of these cases, New Jersey employers whose employees had struck sued for declaratory and injunctive relief to prohibit New Jersey officials from paying welfare benefits to the strikers. Because the labor dispute that had given rise to the suit and the strike sought to be enjoined had both ended, the Court expressly held that the suit had become moot as to the request for injunctive relief.[3] The Court found, however, that a real controversy continued with respect to the request for declaratory relief. The court stated, "the challenged *governmental* activity . . . [was] not contingent, ha[d] not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." [4] Thus declaratory relief was appropriate because the non-

[1] U.S. Constitution Art. III, § 2.

[2] 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974).

[3] 416 U.S. at 121, 94 S.Ct. at 1698.

[4] 416 U.S. at 122, 94 S.Ct. at 1698 (emphasis added).

contingent nature of the officials' action ensured that they would pay welfare benefits during the next strike, and the mere threat that this would occur substantially strengthened the employees' hand.

While the collective bargaining agreement involved in *Buffalo Forge v. United Steelworkers of America, AFL-CIO* [5] had ended when the case was heard, the question was whether issues arising under it were arbitrable, and the parties had stipulated that "the collective bargaining agreements *in effect when this action arose . . . govern resolution of this dispute.*" [6] The issue then was the interpretation of the original agreement. "Furthermore," the Court stated, "were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision." [7]

Reliance on *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association* [8] is even more unwarranted, for in that case the collective bargaining agreement invoked had not terminated. A strike to protest the shipment of fertilizer to the Soviet Union had ended but, the Court noted, "[a]lthough the work stoppage is no longer in effect, there remains a live controversy over whether the collective-bargaining agreement prohibits politically motivated work stoppages, and the Union may resume such a work stoppage at any time." [9] This was the conclusion this circuit had earlier reached in the same case.[10]

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[5] 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976).

[6] 428 U.S. at 404 n.8, 96 S.Ct. at 3146 n.8 (emphasis added).

[7] 428 U.S. at 407, 96 S.Ct. at 3147.

[8] 457 U.S. 702, 102 S.Ct. 2672, 73 L.Ed.2d 327 (1982).

[9] 457 U.S. at 704 n.1, 102 S.Ct. at 2676 n.1.

[10] *New Orleans Steamship Ass'n v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), *aff'd* 457 U.S. 702, 102 S.Ct. 2672, 73 L.Ed.2d 327 (1982).

In contrast, the issue between the union and the airline is unsettled only because the parties failed to resolve it by collective bargaining when their earlier agreement expired. Even if the Constitution did not forbid us to decide this controversy, which has continued only by the manipulation of the parties to the dispute, we should exercise our prudential prerogative to abstain because we ought not to allow ourselves to become an instrument in the parties' collective bargaining process.

If there is a question of exceptional importance for which the en banc procedure is reversed,[11] it is not the one decided by the majority opinion. It is, instead, whether we will permit the parties in this fashion to provoke a rehearing en banc by a 16-judge court. I would not allow them to do so, and would dismiss the appeal.

For these reasons I respectfully dissent.

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[11] Fed. R. App. P. 35.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

June 29, 1989

TO ALL COUNSEL OF RECORD LISTED BELOW

No. 87-1085 International Brotherhood of Teamsters, Chauffeurs, Et Al. v. Southwest Airlines

(OPINION RENDERED 6/22/89)

Dear Counsel:

The Court has added two footnotes to its slip opinion rendered in the above cause on June 22, 1989. The footnotes appear at page 4321 as follows:

1) The sixth line on the page contains the word "VACATED". An asterisk will appear immediately thereafter and the following footnote reads *Because of timing, *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, No. 88-1, 1989 U.S. LEXIS 3000 (June 19, 1989), played no role in the consideration of this case by our en banc court. In *consolidated Rail*, the Supreme Court held that the railway's inclusion of drug testing in periodically required physical examinations raised a minor dispute in that the action was arguably justified by implied terms of the parties' agreement. There are significant differences between the facts of *Consolidated Rail* and our case, as well as distinct contractual bases for the respective decisions. We note only that the Supreme Court's discussions of major and minor disputes supports our analysis and conclusion, and we see nothing in our opinion requiring modification on account of the Supreme Court's decision in *Consolidated Rail.*

2) Line nine of the second column contains the word "frayed". Footnote 1a is referenced and the footnote reads "As the majority states in its footnote, the Supreme Court decided *Consolidated Rail Corp. v. RLEA*, 57 U.S.L.W. 4742 (June 19, 1989), after our full consideration of this case. I agree that *Consolidated Rail* adopts the "arguably justified" standard for determining whether a dispute is major or minor. I also believe that the case is distinguishable from our case on its facts. However, I do not agree that *Consolidated Rail* "supports [the majority's] analysis and conclusion."

In *Consolidated Rail*, the Court held that the union had arguably bargained for particular management "discretion to make a particular change in working conditions without prior negotiation. . . ." 57 U.S.L.W. at 4745 n.7. In other words, within the particularized zone of management discretion for which the union arguably had bargained, which was arguably contained in the controlling implied terms of the already-formed agreement, management's unilateral act, arguably, was not a "change in the agreement" within the meaning of 45 U.S.C. §§ 152, Seventh, 156; *Elgin, J. & E. R.R. Co. v. Burley*, 325 U.S. 711, 723 (1945). Accordingly, the Court in *Consolidated Rail* held that the dispute was minor.

In this case, the majority finds Southwest's arguable discretion to act unilaterally in a boilerplate management rights clause. As I discuss below, absolutely nothing in this case suggests that the Union has bargained away such vistas of discretion to Southwest.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Richard E. Windhorst, Jr.
RICHARD E. WINDHORST, JR.
Chief Deputy Clerk

REW:lmc

Mr. J. Joe Harris

Messrs. James L. Hicks, Jr. and
Hal K. Gillespie

Ms. Wilma B. Liebman

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-1085

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AIRLINE DIVISION & TEAMSTERS LOCAL 19,
Plaintiffs-Appellees,

v.

SOUTHWEST AIRLINES CO.,
Defendant-Appellant.

April 21, 1988

Before GOLDBERG, JOHNSON and WILLIAMS, Circuit Judges.

IRVING L. GOLDBERG, Circuit Judge:

Southwest Airlines appeals from the District Court's conclusion that this controversy between Southwest and its mechanics over implementation of a program of mandatory testing for drug and alcohol use constitutes a "major" dispute as defined by the Railway Labor Act. We therefore review the District Court's legal conclusions that the program involves a mandatory subject of bargaining and that the program is not "arguably justified" by the collective bargaining agreement, as well as the District Court's factual findings supporting those conclusions. Finding no error, we affirm the District Court's grant of a preliminary injunction.

I. FACTS

Appellant, Southwest Airlines Co. ("Southwest"), is a common carrier by air engaged in interstate commerce subject to the Railway Labor Act. 45 U.S.C. §§ 151-188 (the "RLA"). In 1982, Appellee, the International Brotherhood of Teamsters (the "Teamsters"), succeeded the International Association of Machinists as representative of Southwest's mechanics and related employees.

Until August of 1987, Southwest and the Teamsters were parties to a collective bargaining agreement.[1] The collective bargaining agreement contained a management rights clause which provided:

> Employees covered by this Agreement shall be governed by all Company rules, regulations and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which

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[1] At oral argument counsel advised the panel that, though the contract is open, Southwest remains steadfast in its position that it has the right to unilaterally impose the drug testing program and refuses to bargain. This case is not moot. Even with the contract open for bargaining, we must at least reach the question of whether the proposed program constitutes a mandatory subject of bargaining. Even if management conceded that mandatory drug testing is a mandatory subject of bargaining, the dispute would continue, as capable of repetition but evasive of review. *Compare Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *with Defunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). Were we simply to reach whether this is a mandatory subject, it is entirely conceivable that the parties would bargain to impasse, appeal and reach this court only after the contract was again open for bargaining. *Burlington N. R.R. v. Bhd. of Maintenance of Way Employees*, —— U.S. ——, 107 S.Ct. 1841, 1846 n.4, 95 L.Ed.2d 381 (1987). *See Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (*per curiam*); *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 353, 42 L.Ed.2d 532 (1975). We therefore reach the question of whether this dispute is "major" or "minor" under the RLA.

have been made available to the employee prior to becoming effective.

(R. Vol. I, p. 83). The collective bargaining agreement contains no rules against drug and alcohol abuse.

Southwest has, however, maintained a unilateral imposed work rule, Rule G,[2] which provides:

> *G. Serious Unacceptable Conduct.*
>
> Violation of any of the following is considered a serious offense and may result in immediate discharge.
>
> . . . .
>
> 4. Reporting for or carrying on work while *showing* any *signs* of the use of intoxicants or knowingly permitting another employee to do so is strictly prohibited.
>
> 5. *Possession* of or *drinking* of any intoxicant or illegal *possession* or *use* of illegal or dangerous drugs *on company premises* or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated.

(R. Vol. I, p. 141) (emphasis added).

The District Court found that before October, 1986, Southwest had no existing practice for detecting violations of rules G(4) and G(5) other than visual observation. (R. Vol. III, p. 115). The District Court also found that there was no history of problems with drug or alcohol abuse[3] and no history of Rule G enforcement. Southwest presented evidence of only one instance where an

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[2] Some form of Rule G has been in force throughout the Railroad and Airline industries for at least 40 years. *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 838 F.2d 1102, 1107 (9th Cir. 1988).

[3] Southwest's counsel conceded this point at oral argument.

employee was observed to be drunk while on duty. Southwest offered the employee an opportunity to take a urine test. He refused. He was neither forced to take the test nor disciplined for his refusal, based upon Southwest's belief that it could not require testing.[4]

On October 16, 1986, Southwest advised the Teamsters of its desire to unilaterally implement a drug and alcohol testing program (the "Program"). Southwest invited representatives of the Teamsters to a meeting on November 6, 1986 for the purpose of reviewing the Program, saying, "because we have added to our current regulations, we wanted you to have this information prior to its distribution." (R. Vol. I, p. 180). The Teamsters immediately sought to bargain over the terms of the Program. Southwest expressed a willingness to discuss the content of the proposed Program, but refused the Teamsters' request to bargain. (R.Vol. I, p. 181-184; R.Vol I, p. 137). Unions representing other Southwest employees engaged in discussions with Southwest which altered the shape of the Program.

The Program consists of: 1) a general work rule or policy, which prohibits detectable levels of illegal drugs, defines alcohol intoxication as a blood alcohol level of .05%, and prohibits use of over-the-counter and prescription drugs which might impair performance;[5] 2) manda-

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[4] (R. Vol. III, p. 62-67, 70-74, 117-118). One other employee who had a problem with accidents and absenteeism was offered the opportunity to enter an alcohol treatment program. He refused. He was ultimately fired, but for the absenteeism and accident problem, not because of any problem with alcohol, or because of any refusal to take a test.

[5] The new policy provides:

> Southwest Airlines prohibits Company employees from reporting for work and/or from working with:
>
> - detectable levels of illegal drugs in their systems.
> - alcohol levels which could impair their ability to perform their duties and thus adversely affect the safety of the air-

tory pre-employment urine drug screens, and mandatory urine drug screens of employees under certain defined circumstances;[6] 3) detailed testing rules including employee releases, confidentiality and chain-of-custody safeguards, use of a confirmatory test in the event of a positive initial result, and provisions for a second test at an

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line and/or the work being performed, and in no event, a level in excess of .05%. Should regulations or law require a stricter level for any particular work group, those levels would supercede the .05% level.

- prescription drugs and over-the-counter medication which could, in the opinion of . . . Company appointed doctors, have adverse effects on the safety of the airline and/or the work being performed. Should there be a question regarding prescription drugs and over-the-counter medications being taken by employees who are required to have physicals for license purposes, the Company appointed doctor(s) will consult with the doctor issuing the medical certificate.

[6] The Program requires testing as follows:

Drug/Alcohol Testing for Current Southwest Employees

A. Employees of Southwest Airlines *will* be sent for urine drug screens and/or blood alcohol tests under the following circumstances:

1) After each vehicular equipment and/or aircraft damage accident *unless* management waives the test due to their investigative conclusion that alcohol or drugs could not in any way have been contributory to the incident.

2) After each on-duty accident (other than vehicles or aircraft) and/or on-the-job injury in which there is reasonable suspicion * to believe that an employee has violated Southwest's drug/alcohol policy.

3) Whenever management has reasonable suspicion * to believe that the policy has been violated.

4) Whenever a previously non-physical employee successfully interviews for a position within the company which requires a physical examination.

* "Reasonable suspicion" shall include, but not be limited to, management's personal observation of an employee's appearance, behavior, or speech.

employee's request;[7] and 4) establishment of punishments and procedures to be followed in the event of violation of the policy.[8]

On January 1, 1987, Southwest implemented the Program. The Teamsters objected and sought a preliminary injunction. The District Court enjoined the Program, concluding that its implementation constitutes a "major" dispute under the RLA. The District Court supported this conclusion by finding that the Program constitutes a comprehensive means of monitoring, testing and punishing violations of rules prohibiting drug and alcohol use or possession, and that as such it is not arguably justified

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[7] Tests are to be performed according to defined procedures:

> Laboratories will be approved and designated for testing and procedures will be established for uniformity and accuracy, including chain-of-custody safeguards. The importance of confidentiality will be stressed in all situations and will be considered to be an aspect given utmost consideration. The name of the employee being tested, as well as results of the test will be restricted to the Vice President of the respective department and the Review Board. All positive results of a preliminary screen will be automatically tested by the laboratory using the GC Mass Spectrometry method *before* sending the report to the Company and samples will then be kept for a two week period following the collection. Should this test be positive, the employee may request a re-test and shall bear the expense of this test; Southwest will pay for re-tests which yield negative results. (approximate cost of retest: $75.00.)

[8] The Program prescribes the following punishments:

> A. Violation of any portion of Southwest's Drug and Alcohol Policy by employees shall subject them to disciplinary action, up to and including discharge. . . .
>
> B. In cases which arise from testing under Section IV, Part A-4 where there have been no visible signs of drug and/or alcohol use or abuse but where the employee tests positive for illegal drugs when going through the Company required physical, said employee will be given 5 days from the time of notification of the test results to seek assistance through Southwest's EAP. If contact has not been made within this time period, the employee will be terminated. . . .

by Rule G or past practice of enforcing Rule G. The District Court further concluded that each element of the Program constitutes a "major" change warranting an injunction. Alternatively, the District Court concluded that even if the disputes were deemed "minor" there exists a substantial likelihood of irreparable harm warranting an injunction to preserve the status quo pending arbitration of the dispute under the terms of the labor contract.[9]

II. Discussion

In deciding this case we are cognizant of Oliver Wendell Holmes dictum "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Northern Securities v. United States*, 193 U.S. 197, 400, 24 S.Ct. 436, 486, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

Drug testing in the public and private sectors is an issue of great social importance and controversy. Over 25% of the Fortune 500 companies now require drug tests of all successful job applicants.[10] The Federal gov-

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[9] Because we today determine that this dispute is major, we need not determine whether the district court abused its discretion in issuing an injunction to preserve the status quo based on the possibility of irreparable harm. Still, we note that the common law places a high value on individual privacy. Unreasonable invasions of privacy are considered tortious, *see* Brandeis and Warren, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890), and the harm done is not easy to quantify. Because we do not reach the question we need not determine whether the likelihood of a finding that the invasion of privacy will be found unreasonable merits granting of a preliminary injunction.

[10] National Institute on Drug Abuse, *Alcohol and Drugs in the Workplace* 29 (1985) (BNA Special Report); *see* Aron, *Drug Testing: The Employer's Dilemma*, 38 Labor L.J. 157 (1987); *Wood*,

ernment has enacted regulations requiring drug tests of customs inspectors, and has proposed regulations requiring testing of railroad employees. Courts have reached different conclusions regarding whether such drug testing constitutes a reasonable search under the Fourth Amendment. *Compare National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.1987), *cert. granted*, —— U.S. ——, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988) (approving plan for testing of customs officials), *with Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.1988) (invalidating Department of Transportation regulations requiring testing of railroad workers). The Supreme Court has granted certiorari in *Von Raab* to deal with the fourth amendment issue.

In this climate it is perhaps useful to spell out first what this case does not involve. It does not deal with the legality of private employers requiring a drug test as a condition of employment. It does not deal with the constitutionality of government mandated drug testing. It does not deal with the propriety of allowing employees to use drugs. It deals only with the rights of a collective bargaining representative to participate in the formulation of a mandatory drug testing program, to negotiate over the shape that program will take. Though this case involves issues of national importance, it can and must be resolved by reference to established principles under the RLA as enacted by Congress and interpreted by the courts. The determinative factors are not whether drugs are dangerous, or whether drug testing is intrusive, but whether the program of mandatory testing and punishment chosen by Southwest is consistent with the collective bargaining agreement between Southwest and the Teamsters.

Employee Drug Testing: Practical and Legal Considerations, 66 Mich.B.J. 158 (1987); Rust, *Drug Testing: The Legal Dilemma*, 72 A.B. A.J. 50 (1986).

A. Mandatory Subject of Bargaining?

The first inquiry in this case is whether the Program is a mandatory subject of bargaining under the Railway Labor Act. This is a question of law, which we review *de novo*. *Japan Airlines Co. v. International Association of Machinists*, 538 F.2d 46, 52-53 (2d Cir.1976). Unless a dispute involves a mandatory subject, management may act unilaterally without discussing the change with the collective bargaining representative. *Order of Railroad Telegraphers v. Chicago & Nw. Ry.*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960) (subcontracting out of work that would deprive existing employees of their jobs constitutes a mandatory subject); *see Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964).

The Railway Labor Act imposes a duty upon employers and labor unions to bargain in good faith over "rates of pay, rules and working conditions." [11] But "The collective bargaining process is neither a short nor an easy one and the delicate balance upon which ultimate agreement frequently rests would be needlessly jeopardized were the parties at liberty to insist upon the discussion of subsidiary matters. . . . Inevitably, the chances of deadlock increases as the perimeter of negotiations expands." *Japan Air Lines*, 538 F.2d at 52. For this reason, the First, Second and Ninth Circuits have held that the duty to bargain imposed by the RLA extends only to those proposals directly related to "rates of pay,

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[11] 45 U.S.C. § 152, First, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

rules and working conditions." *Id.; International Association of Machinists v. Northeast Airlines*, 473 F.2d 549, 556-57 (1st Cir.), *cert. denied*, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 85 (1972); *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 838 F.2d 1087, 1090-91 (9th Cir.1988). One of these issues must be implicated, and the action by management must affect people presently in the bargaining unit. *Japan Airlines*, 538 F.2d at 53.[12]

Applying this standard, the Ninth Circuit has determined that both mandatory drug testing and random use of "sniffer dogs" to detect drugs are mandatory subjects of bargaining. *Brotherhood of Locomotive Engineers v. Burlington* N. R.R., 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 838 F.2d 1087 (9th Cir.1988).

No case in this Circuit has dealt with this issue under the RLA. We are guided, however, by cases decided under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (the "NLRA"). This Circuit has held that the term "conditions of employment," [13] as used in § 8(d) of the NLRA, includes safety rules. *NLRB v. Gulf Power Company*, 384 F.2d 822 (5th Cir.1967). The Supreme Court has held that under the NLRA mandatory subjects are those which are "germane to the 'working environment,'" and "not among those "managerial decisions [] which lie at the core of entrepreneurial con-

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[12] *See* NLRB General Counsel's Memorandum on Drugs and Alcohol Testing, Memorandum GC 87-5 (September 8, 1987) *reprinted in* Daily Labor Report No. 184, pg. D-1 (September 24, 1987) [hereinafter cited as Collyer, *NLRB General Counsel's Memorandum on Drug and Alcohol Testing*].

[13] The term "conditions of employment" is "susceptible of diverse interpretations," *Fibreboard*, 379 U.S. at 221, 85 S.Ct. at 408 (Stewart J., concurring). It can be read as relating to the physical conditions under which employees labor or as relating to prerequisites to employment.

trol.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498, 99 S.Ct. 1842, 1850, 60 L.Ed.2d 420 (1979) (quoting *Fibreboard*, 379 U.S. at 222-23, 85 S.Ct. at 409-10).

Southwest conceded at oral argument that instituting the Program constitutes a change in working conditions and this is correct.[14] We have no doubt that instituting a drug testing program is directly related to the working

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[14] Ms. Rosemary Collyer, General Counsel to the NLRB has stated unequivocally that mandatory drug testing constitutes a "substantial change in working conditions" even where there is an existing program of mandatory physicals.

> In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform work. In addition, it is our view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is a "material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally."

Collyer, *NLRB General Counsel's Memorandum on Drug and Alcohol Testing* (cited in note 12).

conditions of employees presently within the bargaining unit.

Though the Program decidedly involves a mandatory subject of bargaining, Southwest contends that the Teamsters have waived their right to bargain over work rules by accepting a management rights clause. A party may, of course, contractually waive its right to bargain about a particular mandatory subject. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952). But waiver by contract must be "clear and unmistakeable," and cannot be lightly inferred. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); *see* Morris, 1 *The Developing Labor Law* 640-50 (2d ed. 1983). We may find waiver by contract where the language of the agreement is specific, or the history of prior contract negotiations suggests that the parties discussed the subject and the union "consciously yielded." *NL Industries, Inc.*, 220 N.L.R.B. 41, 43-44 (1975), *enf'd* 536 F.2d 786 (8th Cir.1976). Where management rights clauses are invoked the clause must provide specific justification for the unilateral action taken. *See Ador Corp.*, 150 N.L.R.B. 1658 (1965).

The management rights clause in the collective bargaining agreement between Southwest and the Teamsters provides simply that employees shall abide by all rules presently in effect and later enacted. The clause says nothing about the process for enacting new rules. The Teamsters have merely agreed to abide by all rules which are validly enacted.[15] The language does not facially

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[15] Ms. Collyer dismissed this type of waiver argument saying:

> We have concluded that in the absence of clear bargaining history to the contrary, broad management rights clauses giving an employer the right "to issue, enforce, and change Company rules", or to "make and apply rules and regulations for production, discipline, efficiency and safety" or requiring employees to observe the employer's existing rules and regulations, do not, standing alone, constitute a waiver of the union's right to

imply a waiver by the Teamsters of the right to bargain over work rules which involve mandatory subjects, and falls far short of the clear statement required to constitute "clear and unmistakeable waiver." Far from waiving their right to bargain, the Teamsters have consistently insisted on their right to negotiate over implementation of the Program.

B. *Is This Dispute Major or Minor?*

Having determined that the proposed Program involves a mandatory subject of bargaining, the jurisprudence that has arisen under the Railway Labor Act requires us further to determine whether this dispute over implementation of the Program constitutes a "major" or a "minor" dispute.

In *Brotherhood of Locomotive Firemen v. Southern Pacific R.R.*, 447 F.2d 1127, 1131-32 (5th Cir.1971), we explained the workings of the Railway Labor Act. The basic purpose of the RLA is "[t]o avoid any interruption of commerce or the operation of any carrier engaged therein." 45 U.S.C. 151a. To this end the RLA has created a complex but effective set of mechanisms for resolving disputes. The RLA begins, in Section 2, First, of the Act, by imposing a general duty on both parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions." 45 U.S.C. § 152, First. Section 2, Second, of the Act requires parties to all disputes to make attempts to resolve the dispute voluntarily. 45 U.S.C. § 152, Second.

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bargain over drug testing. Such clauses refer only to employer rules and regulations generally and do not refer clearly and specifically to drug testing. And, as previously observed, drug testing is not a "rule or regulation" but, rather, is a unique and distinctive means of enforcing rules regarding drug use.

Collyer, *NLRB General Counsel's Memorandum on Drug and Alcohol Testing* (cited in note 12).

Should voluntary attempts to resolve the dispute fail, the RLA provides two sets of procedures following two distinct strategies for dealing with the two basic types of dispute. Although the Act did not expressly label these two categories of controversies, they are commonly referred to as "major" disputes and "minor" disputes. *See Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945). "Major" disputes are those disputes arising from proposed changes in a collective bargaining agreement.[16] "Minor" disputes involve grievances arising over the interpretation or application of existing collective bargaining agreements.[17] The RLA treats these two types of disputes very differently. "Major" disputes are dealt with through mediation in the context of a judicially enforced status quo. "Minor" disputes, or grievances, are dealt with through binding arbitration.

If the controversy is "major," that is, a dispute arising out of proposals for a new contract or for changes in

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[16] In *Burley*, the Court described "major" disputes as those which arise:

> over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights to have vested in the past . . . . [they are] the larger issues about which strikes ordinarily arise with consequent interruptions of traffic the Act sought to avoid.

325 U.S. at 723-24, 65 S.Ct. at 1289-90.

[17] A "minor" dispute:

> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring a formal change in terms or to create a new one. The dispute related either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Id. at 723, 65 S.Ct. at 1290.

existing agreements, the parties first go to mediation, § 5, First, 45 U.S.C. § 155, First; if that fails, to acceptance or rejection of arbitration, *id.*; and finally to possible Presidential intervention. § 10, 45 U.S.C. § 160. While the Act's bargaining procedures are being exhausted, the union is prevented from striking and the carrier is prohibited from doing anything that would justify a strike.[18] Once these procedures are exhausted,

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[18] *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 107 S.Ct. 1841, 1851, 95 L.Ed.2d 381 (1987); *Detroit & T. Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). The Act establishes three provisions which preserve the status quo in major disputes. Each covers a different stage of the dispute settlement process. As described by the Supreme Court:

> Section 6, the section of immediate concern in this case provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in the agreements up to and through any proceedings before the National Mediation Board. Section 5, First, provides that for 30 days following the closing of Mediation Board proceedings "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose," unless the parties agree to arbitration or a Presidential Emergency Board is created during the 30 days. Finally, § 10 provides that after the creation of an Emergency Board and for 30 days after the Board has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose," these provisions msut be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2, First, "to exert every reasonable effort" to settle disputes without interruption to interstate commerce.
>
> While the quoted language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2, First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling-off" period. Although these three provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned. The obli-

however, compulsory processes are at an end, and either party may resort to self help or unilateral action. *Burlington N. R.R.*, 107 S.Ct. at 1851; *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-79, 89 S.Ct. 1109, 1115-16, 22 L.Ed.2d 344 (1969). No authority is empowered to decide the dispute unless the parties jointly agree to arbitration.

If the dispute is "minor," that is, a controversy arising over the interpretation or application of an existing collective agreement, either party, upon impasse, may submit the grievance to final and binding arbitration before the National Railroad Adjustment Board or a system board of adjustment established by the parties. 45 U.S.C. § 153, First (m), Second. While resort to self-help, such as strikes is precluded in minor disputes, *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *cf Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), there is no general provision in the Act prohibiting a party from acting unilaterally upon its interpretation of the contract pending exhaustion of the grievance procedures. *International Association of Machinists v. Frontier Airlines, Inc.*, 664 F.2d 538 (5th Cir.1981); *Switchmen's Union v. Central of Georgia Ry.*, 341 F.2d 213 (5th Cir.), *cert. denied*, 382 U.S. 841, 86 S.Ct. 41, 15 L.Ed.2d 82 (1965).

Though the distinction between "major" and "minor" disputes rests on a legislative judgment that issues of contract formation tend to be more divisive than isues of contract interpretation, the method for determining whether a dispute is major or minor has absolutely noth-

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gation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

396 U.S. at 150-53, 90 S.Ct. at 299-300.

ing to do with how important a dispute is. The sole question is whether the proposed change has a basis in the contract. When a dispute can be resolved through an interpretive act, by reference to the contract or practice, the dispute may be resolved by an arbitrator. When the contract provides no guidance, no individual is empowered to resolve the dispute.

We must therefore determine whether this dispute involves contract interpretation or contract alteration. This legal conclusion rests heavily on the facts of the specific case. The cases in this Circuit demonstrate that "the difference on the one hand between the interpretation and application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree." *Brotherhood of Locomotive Firemen*, 447 F.2d at 1134 (quoting, *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir.1962), *cert. denied*, 372 U.S. 954, 83 S.Ct. 949, 9 L.Ed.2d 987 (1963)). These attempts to distinguish between interpretation and modification present a wavering line which places a relatively light burden on the party proposing the change. An employer is not a modern day Prometheus bound by contractual chains of his own making. A dispute is minor, so long as the proposed change is "arguably justified" by the existing collective bargaining agreement. *Railway Express Agency Inc. v. Brotherhood of Ry. Airline & S.S. Clerks*, 437 F.2d 388, 392 (5th Cir.), *cert. denied*, 403 U.S. 919, 91 S.Ct. 2230, 29 L.Ed.2d 696 (1971). In *St. Louis, S.F. & T. Ry. v. Railroad Yardmasters of America*, 328 F.2d 749 (5th Cir.), *cert. denied*, 377 U.S. 980, 84 S.Ct. 1886, 12 L.Ed.2d 748 (1964), for example, Judge Tuttle concluded that the permissibility of elimination of yardmaster positions could be determined by reference to the contract. He said, "[W]e are at a loss to understand how it could be decided that the rights of the Union can be determined without a construction of the employment contract or agreement. . . . This is to be done by the ap-

propriate tribunal . . . . It is *not a fictitious* or *merely colorable issue*. Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)." *Id.* at 753 (emphasis added); *see also Brotherhood of Locomotice Firemen*, 447 F.2d at 1127 (dispute between railroad, engineer's union and firemen's union over method for calculating hours could be resolved by construing the agreement between the firemen and the railroad and was therefore not a "clear change" but a question of interpretation); *Railway Express Agency Inc. v. Brotherhood of Ry. Airline & S.S. Clerks*, 437 F.2d at 392 (where there was an "undisputed history of . . . unilateral transfers of work with no apparent objection from the union . . . REA [had] at least the arguable right to make [such] transfers."); *St. Louis S.W. Ry. v. United Transportation Union*, 646 F.2d 230 (5th Cir. 1981) (union's proposed modifications in group disability insurance benefits and caboose design specifications deemed "major" but possibly dispositive "minor" question of whether the Union's proposal was barred by a moratorium provision in a national agreement between the parties that forbids certain types of union proposals was to be decided first).

In determining whether a proposal is "arguably justified" by the contract we must look both to the contract itself and to the practices under the contract. "When long-standing practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective-bargaining agreement itself. Such practices have been described as the 'actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose.'" *Brotherhood of Maintenance of Way Employees v. Burlington N. R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (quoting *Detroit & T. Short Line R.R. v. United Transportation Union*, 396 U.S. 142, 90 S. Ct. 294, 24 L.Ed.2d 325 (1969)). Thus we are faced with the ques-

tion of whether the proposed Program is arguably justified by the contract as embodied in the express terms of the collective bargaining agreement, and as amplified by actual objective working conditions and practices.

Southwest argues that the Program is "arguably justified" either by the management rights clause discussed above, or by Rule G, which prohibits alcohol or drug use or possession during work time or on the airline premises. Applying this standard, the District Court found that the Program as a whole as well as its individual components constitute major disputes.[19] The District Court applied the proper legal standard. We may reverse its factual findings only if they are clearly erroneous.

1. Is the Program Arguably Justified by The Management Rights Clause of The Collective Bargaining Agreement?

In addition to arguing that the management rights clause of the contract constitutes a waiver of the right to bargain over work rules, Southwest argues that the management rights provision provides arguable justification for unilateral imposition of the Program. The District Court rejected this argument on the basis of the lower court opinions in two cases recently affirmed on this point by the Ninth Circuit. *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 620 F.Supp. 163 (D.C. Mont.1985), *aff'd*, 838 F.2d at 1105; *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 620 F.Supp. 173 (D.C. Mont.1985), *reversed*, 838 F.2d at 1090. South-

[19] Southwest argues further that the District Court erred by failing to apply the proper legal standard to the collective bargaining agreement. Errors of law are reviewed de novo. Southwest's allegation, however, is without merit. Judge Buchmeyer expressly stated that he would find the dispute to be major only if "a proposed practice by a carrier is a clear departure from the collective bargaining agreement," (R. Vol. III, p. 109) and conceded that "if the practice is arguably justified by the collective bargaining agreement, including . . . past practices under the agreement, then a dispute is . . . a minor one." *Id.*

west argues that this case differs from the *Burlington* cases because the collective bargaining agreement contains a specific clause which they interpret at a waiver by the Teamsters of their right to bargain over changes in work rules. Because the standard for determining whether a dispute is "major" or "minor" turns on whether the interpretation is "arguably justified" by the contractual term, it is not our place or that of the district court to construe the contract if there is any doubt as to its meaning. But as we noted above, the management rights clause in this contract does not speak at all to the right to bargain over rules, only to a willingness to abide by rules validly enacted. Given the principles for construing management rights clauses discussed above, the question is not a close one. The District Court did not err in concluding that the management rights clause does not even arguably justify the Program.

2. Does Rule G Provide Arguable Justification for Mandatory Drug Testing?

With the exception of the management rights clause, the collective bargaining agreement contains nothing which relates to, let alone justifies, the unilateral imposition of mandatory drug testing. As mentioned above, however, a work rule, Rule G, prohibits intoxication, possession or use of alcohol or illegal drugs on company premises. Rule G, has been in effect throughout the duration of the collective bargaining agreement, and must be considered part of the contract. It is therefore necessary to determine whether either Rule G standing alone, or Southwest's history of enforcing Rule G provides a contractual basis for imposition of the Program.

No case in this Circuit has dealt with this question, but three cases have been decided in other circuits. All of them involve the Burlington Northern Railroad. *Brotherhood of Maintenance of Way Employees v. Burlington N. R.R.*, 802 F.2d 1016 (8th Cir.1986) (*Burlington I*); *Brotherhood of Locomotive Engineers v. Burlington N. R.R.*, 838 F.2d 1087 (9th Cir. 1988) (*Burlington II*);

Brotherhood of Locomotive Engineers v. Burlington N. R.R., 838 F.2d 1102 (9th Cir.1988) (*Burlington III*). For convenience we will refer to them as *Burlington I*, *Burlington II*, and *Burlington III*.[20] While not dispositive, these cases provide examples of different forms of Rule G enforcement coupled with different types of drug testing programs. We examine the legal conclusion of the District Court in light of these decisions, comparing their factual context and contractual language with this case. In so doing we reiterate that the legal conclusion whether a practice is "arguably justified" is one of degree, and that we may reverse the factual findings which form the basis of this conclusion only if they are clearly erroneous. We must look at the aspects of the drug testing program in the particular case as well as the history of enforcement under that collective bargaining agreement. With all of this in mind, we conclude that of the four cases, this is the strongest case for a conclusion that the dispute is "major."

a. Union acquiesence in voluntary urinalysis arguably justifies mandatory testing on particularized suspicion.

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[20] A fourth case, *Railway Labor Executives v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987), is of no relevance to this case. There a railroad sought to include a mandatory drug screening test as part of the routine urinalysis taken during all company physicals. The district court found that Rule G had no bearing whatsoever on the justification for the test, but instead that the test was arguably justified by the uniform past practice of urinalysis during all company physicals. *See also Burlington I*, 802 F.2d at 1024. Southwest does not argue that any past practice of urinalysis during physicals justifies the practice of mandatory testing as required under the Program.

Burlington II relied on another decision decided by the Ninth Circuit on the same day, *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), to dispose of Burlington's argument that the right to impose mandatory drug testing was an implied in law term of the contract as a result of the Department Of Transportation's Drug and Alcohol regulations. *Burnley* invalidated those regulations. Today we say nothing about the validity of federally mandated drug testing, or its effect on the contract. It is not at issue in this case.

Burlington I was the first case at the Circuit level to deal with mandatory drug and alcohol testing. The Eighth Circuit found that "the parties [had] acquiesced in certain detection and investigation methods over the years, and these practices [could] fairly be considered to have become the status quo," 802 F.2d at 1022. Initially the primary method for Rule G enforcement was visual observation followed by further non-intrusive investigation by the supervisor. "The supervisor would rely on how the employee walked, talked, or smelled as well as on other physical manifestations of impairment." *Id.* at 1018. Later, however, the company began to use a breathalyzer, blood-alcohol tests, and urinalysis, but only as a means for the employee to clear himself of an accusation of a Rule G violation. The Union did not object to using drug testing in this manner. The District Court consequently found that there was a history of union acquiescence in Rule G enforcement through use of drug testing. Still, there was a limit to that acquiesence. "The union's acquiescence in [Burlington's] past methods of enforcement was hardly intended to authorize a dragnet." *Id.* at 1023. The District Court in *Burlington I* found that a past practice had developed of acting to enforce Rule G where visual observation created particularized suspicion and further investigation confirmed that suspicion.

Cognizant of this past practice, the Eighth Circuit looked to the proposed program. The program consisted of post incident testing on the basis of particularized suspicion. Testing was used only following human factor accidents, and only when individual responsibility was not clear. Moreover, Burlington assured the Court that they would not test a whole crew when suspicion could be focused on particular individuals who were in a position to have caused the accident. Given the past history of investigation after ascertaining particularized suspicion, the urine test was seen simply as "a more refined step . . . to confirm the observation of the supervisor." *Id.* at 1023. The District Court concluded and the Eighth Circuit

agreed that "Since the test can be required only upon some showing that the employee may be impaired, the ground rules between the union and the railroad have not changed significantly; suspicion of impairment is still required." *Id.* The Eighth Circuit expressly stated that it took no position over whether a broader testing policy would be permitted.[21]

b. Past practice of Rule G enforcement by visual observation without acquiesence in voluntary drug testing does not arguably justify mandatory testing based on generalized suspicion. In *Burlington II*, Burlington Northern introduced a program requiring all crew members involved in human factor accidents or operating rule violations to submit to urinalysis for the presence of narcotics, unless responsibility for the accident or violation otherwise had been clearly identified. Any employee refusing to submit to a test was subject to discipline for insubordination. Again the District Court looked to the past practice used for enforcing Rule G and found that the only practice in place was sensory observation. The District Court found this program to be a minor dispute, justified by the past practice of sensory observation. The Ninth Circuit reversed, finding that the change from testing on particularized suspicion to testing on generalized suspicion constituted a major dispute as a matter of law.

There is some tension between this case and *Burlington I*. Indeed, Judge Alarcon argued in dissent that the two cases create a split in Circuits. They can, however, be reconciled. *Burlington II* lacks the past history of union

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[21] Southwest points to one case involving drug testing by an airline. *International Association of Machinists v. Trans World Airlines, Inc.*, 663 F. Supp. 230 (D.D.C. 1987). This case is akin to *Burlington I* insofar as it involves only testing of individual employees based on reasonable suspicion.

Burlington I also involved drug testing during physicals, as did *Norfolk and Western*. Here as well, testing during physicals was justified by reference to the past practice of urinalysis during physicals, rather than by reference to Rule G.

acquiesence in voluntary drug testing, as well as the self imposed limitations of post incident testing to individuals who could have been responsible for the accident. The Eighth Circuit found that these limitations rendered the post incident testing program there at issue a test on particularized suspicion. In the absence of such limitations, the Ninth Circuit found a similar program to be a test on generalized suspicion and a "major" dispute.

c. Rule G enforcement by visual observation does not arguably justify mandatory random search with sniffer dogs. Finally, in *Burlington III*, Burlington Northern instituted a program of random use of sniffer dogs to detect drug possession. The Ninth Circuit affirmed the District Court's finding that such testing based on no suspicion whatsoever constituted a new method of enforcing Rule G that was not "arguably justified" by past practice.

Burlintgon III is fully consistent with *Burlington I*. The *Burlington I* court specifically said that the past practice justified tests based on particularized suspicion, but did not authorize a dragnet. Random use of sniffer dogs constitutes just such a dragnet.

d. Application to the present case. From these cases several principles emerge. *Burlington I* demonstrates that Rule G enforcement by visual observation coupled with a past history of voluntary testing justifies testing only on the basis of particularized suspicion, and that union acquiesence in voluntary use of urinalysis strengthens the argument that mandatory urinalysis is justified. *Burlington III* demonstrates that enforcement by visual observation does not justify testing on no suspicion whatsoever. *Burlington II* applied the self implied limitation on the reasoning in *Burlington I*, and reversed a district court finding that visual observation alone justifies testing on generalized suspicion. All of these cases support a conclusion that the dispute in this case is "major."

i. past practice of Rule G enforcement. In the *Burlington* cases, there was universal acquiesence in visual

observation followed by further investigation. Here the District Court was presented with only one isolated incident of Rule G enforcement and no evidence of enforcement policies or procedures. On review of the record the District Court's finding that there was no past practice is not erroneous.

ii. the scope of the program. We then look at the Program and compare it to those at issue in the *Burlington* cases. The District Court correctly found that this program is far more extensive than the programs involved in the *Burlington* cases.

First, the Program provides for post accident testing of mechanics after a vehicular accident, unless management chooses to waive the test, because it has determined that there could not have been any drug involvement. Both *Burlington I* and *Burlington II* involved post incident testing only after human factor accidents. Southwest wishes to require testing after all vehicular or equipment damage accidents, human responsibility need not be implicated. The potential generality of this element of the program is striking when one considers that airline mechanics are not a part of any particular flight crew. With this in mind it is difficult to determine who would be tested and who could not be tested under the Program. Furthermore the Program does not include the self imposed limitations described in *Burlington I.* Instead testing is only waived if management determine that drugs were not a cause.

Second, the Program calls for mandatory tests of any "previously non-physicalled employee" who "successfully interviews for a position within the company which requires a physical examination." This, like the use of sniffer dogs in *Burlington III*, constitutes testing on the basis of no suspicion whatsoever.

Thus the Program proposed by Southwest includes all of the elements found to constitute "major" disputes by the Ninth Circuit in conjunction with a less extensive

history of Rule G enforcement. Similarly, the Program is far broader in scope than that at issue in *Burlington I*, and the Teamsters have not acquiesced in voluntary use of urine screening. We are therefore inexorably driven to a conclusion that the Program constitutes a "major" dispute.

When the Program is taken as a whole, it includes a general drug and alcohol policy more stringent than Rule G itself, testing procedures not contemplated by the past practice under Rule G, and punishments unrelated to those described under Rule G. We agree with the District Court that the collective bargaining agreement provides no basis whatsover for a mandatory drug testing program as broad and far reaching as that proposed by Southwest.

We also agree with the District Court that it was appropriate to treat the program as a piece.[22] It was intended as a uniform comprehensive drug and alcohol use policy. Southwest, when requested to bargain, argued that they did not wish to bargain with individual unions over the Program, because they wished to apply a consistent policy to all bargaining units.

We are bolstered in our conclusion that Rule G does not provide even arguable justification for the Program by the statements of Rosemary Collyer, General Counsel of the NLRB, examining when contractual justification for a drug testing program should be inferred from past practice:

> A union's acquiesence in a past practice of requiring applicants and/or current employees to submit to

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[22] The District Court also found that each of the individual elements of the plan constituted a "major" dispute. With respect to post incident testing and physical testing, we agree for the reasons stated above. The Program also includes testing of individuals on reasonable suspicion and post accident testing where drug use was indicated. Given the scanty history of Rule G enforcement in this case, the District Court did not err.

> physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing. This would be true even where such past practices exist in conjunction with the kind of general, nonspecific management rights clauses discussed above. Similarly, acquiesence in drug testing "for cause" does not by itself waive a union's right to bargain over random drug testing because such expansion of an existing drug program constitutes "a material, substantial, and significant change.

Collyer, *NLRB General Counsel's Memorandum on Drug and Alcohol Testing* (cited in note 12) (quoting *Murphy Diesel Co.*, 184 N.L.R.B. 757, 763 (1970)).

III. Conclusion

The District Court correctly found that the union had not acquiesced in any method for detecting Rule G violations other than visual observation. Southwest presented no evidence of any past history of discipline for Rule G violations. The District Court properly concluded that the Program is far more extensive and far more intrusive than those at issue in either of the *Burlington* cases involving mandatory urinalysis. The Program allows for testing in circumstances where there is only generalized suspicion and in circumstances where there is no suspicion whatsoever. The district court correctly concluded that implementation of the program creates a "major" dispute.

For these reasons, the order of the District Court is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-1085.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA-AIRLINE DIVISION AND TEAMSTERS LOCAL 19,
Plaintiffs-Appellees,

v.

SOUTHWEST AIRLINES COMPANY,
Defendant-Appellant.

Aug. 9, 1988

ON SUGGESTION FOR
REHEARING EN BANC

(Opinion April 21, 5 Cir., 1988, 842 F.2d 794)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

TRANSCRIPT OF RECORD EXCERPTS

[108] THE COURT: As I indicated to you in the conference last week, I had intended to rule on this matter orally. And these remarks that I'm going to make will constitute my Findings of Fact and Conclusions of Law.

I suspect that the 5th Circuit will resolve the matter and I think I'll do you a service by getting you to the 5th [109] Circuit as quickly as possible so I'll do just that.

My remarks will cover first the major or minor legal issue; secondly, the management rights argument, and then third the alternative argument that even if this is a minor dispute injunctive relief should be granted.

This is obviously a suit for injunctive relief to prevent the Defendant Southwest Airlines from putting into effect unilaterally a program for detecting drug and alcohol use among employees.

In general under the Railway Labor Act, if a proposed practice by a carrier is a clear departure from the collective bargaining agreement, then a dispute over the practice is treated as a major dispute under the act and the carrier may not proceed without first negotiating with the employees' representative. However, if the practice is arguably justified by the collective bargaining agreement, including self past practices of the parties under the agreement, then a dispute is called a minor one and the carrier may proceed unilaterally, subject to arbitration process before the National Railroad Adjustment Board.

I have concluded, based on the evidence and on the arguments and the cases, that what is presented to me is a major dispute. The terms major and minor are not in the act which speaks of changes and agreements effecting rates of pay, rules of working conditions as one

kind of dispute; and then also it [110] speaks of disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules of working conditions as another type of dispute. And the language and the distinction between major and minor disputes is drawn from that language and was first stated in the *Elgin case*, 325 U.S. 711, 1945 Supreme Court decision.

The basic facts are undisputed. Before November of 1986 Southwest Airlines had in effect 2 work rules dealing with drugs and alcohol, rules G(4) and (5). (4) states that "Reporting for or carrying on work while showing any signs of the use of intoxicants, or knowingly permitting another employee to do so, is strictly prohibited." (5) provides that "Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on company premises, or while in uniform, and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated."

The rule—neither the rules nor the contract make any provision for drug or alcohol testing. In the 4-year period during which the Teamsters have represented the bargaining unit effected here, mechanics and related employees, none of those employees have been subjected to any drug or alcohol testing.

In early November of 1986 Southwest notified the Plaintiffs of its intention to unilaterally impose a mandatory drug and alcohol testing program. By responding to a letter [111] that the Teamsters stated its concern for drug and alcohol abuse and requested Southwest to negotiate with it concerning the terms of a drug testing program. By reply letter Southwest stated its refusal to negotiate, its intention to proceed to implement the drug and alcohol testing program. After meeting with the 5 unions, who represent Southwest employees, and making modifications in the program initially proposed, the company did implement the drug testing program.

Defendant's Exhibits 8 and 9 at this hearing do contain the substance of the program. The union has continued to offer to request negotiation and Southwest has continued to offer to discuss the terms of the program but not to negotiate. The program became effective January 1, 1987, although to date under the evidence that I've heard, no employee has been tested or had been disciplined under this program.

Three cases have been cited to me dealing with the implementation of drug and alcohol testing programs under the Railway Labor Act. Each of these cases involves the Burlington Northern Railroad. They are as follows: *Brotherhood of Maintenance Employees vs. Burlington Northern*, 802 F.2d 816, 8th Circuit case, 1986. I'll refer to that as *Burlington I*. *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 620 F.2d, 163, District Court Montana, 1985. I will refer to that as *Burlington II;* finally *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 120 Labor Relations Reporter 3054, [112] District Court Montana, 1985, and I'll refer to that as *Burlington III*. It's the same Court in Montana. And *Burlington II* and *Burlington III* are pending presently before the 9th Circuit and a decision I have been advised is expected momentarily.

On *Burlington I*, the 8th Circuit case, there was a rule, also rule G as in this case which prohibited employees from using, possessing or being under the influence of alcohol of other drugs while at work or while they were subject to be called to duty. However, nothing in the collective bargaining agreement referred in anyway to rule G or to any enforcement or investigation method.

According to the 8th Circuit, however, the parties had acquiesced in certain detection and investigation methods over the years, primarily were sensory observations, both seeing whether the employees appeared to be under the influence of alcohol, also smelling the breath to see if employees smelled of alcohol.

Initially the Railroad used only the visual observations and smelling observations. However, at one point they began to permit the employees to use drug testing, whether breathalyzer, blood alcohol or urine analysis as defensive means to clear themselves, the employees, of accusations that they were at work while they were drunk.

In addition, during routine physical examinations [113] required of all employees, there was urinalysis conducted. Urine tests were taken, although no drug screening was done. There was no at large or random screening or random searches. Under the past practices there had to be a particularized suspicion of a given individual, not general testing or a dragnet.

The 8th Circuit concluded that the contract did not permit the implementation of new drug testing however, that the parties had acquiesced in certain established practices and that any minor departure from these established practices would not constitute a major dispute under the labor act.

The 8th Circuit concluded that there were only minor changes involved in *Burlington I*. That in addition to voluntary use of drug tests, the company implemented mandatory testing. That was to confirm the suspicion that a particular individual, not all employees in general, had violated the drug-alcohol rule.

The 8th Circuit also felt it was a minor change to test all the members of a crew after an accident but that was to occur under the facts only after an accident happened and only when an individual's responsibility was not clear, and the Court noted that under the procedures proposed by the Burlington railroad, that not all members of the crew would be tested at random if it was obvious that one was responsible.

Finally as to the adding of a drug test to the routine [114] physicals that were given, the 8th Circuit concluded that adding the drug screen test to the routine

urine analysis phase of the established medical examination, was a minor dispute.

The decision on the urine analysis test was 2 to 1 decision. The other decisions where minor disputes were involved were unanimous.

Burlington II, the first Montana decision, the same factual background, no contractual provision regarding testing, past practice with visual surveillance by train masters or road foreman but not random dragnet testing, only a particular employee believed to be under the influence of alcohol or drugs. In that instance, the District Judge found that the new drug tests, which were to include random searching by dogs of persons or personal effects, was not arguably justified by the terms of the agreement and concluded that was a major dispute.

Burlington III, also the Montana District Court, concerned the addition of urine analysis as drug test in addition to the visual observations. The District Judge approved that as being a minor dispute, not a major one, and specifically found, however, that the complaint filed by the union did not allege that urinalysis was going to be done on a completely random basis but rather only upon those employees who were believed to have been involved in a violation of the drug-alcohol rule. Under those circumstances the District Judge found that the additional drug testing program was minor.

[115] Now, applying the *Burlington* principles to the present case, there are two provisions in the contract concerning drug testing. Under the evidence I specifically find that there was no established past practice as there was in *Burlington*. There was some one specific incident involving Mr. Lopez in 1984. That was a situation where he was observed to be intoxicated on the job. He was offered a chance to take a test but refused. The company did not discipline him for refusing to take the test. He was disciplined for being drunk on the company premises.

The only other evidence concerned Mr. Moran who was—one who had a horrible absentee and accident record and he was given a chance to go voluntarily to an alcohol treatment program. He received probation but that was for repeated absences and accidents and was not a probation for alcohol problems or violation of the drug-alcohol rule.

So in the context of the *Burlington* cases I would find that there is no established past practice, there was a rule prohibiting the coming to work by someone who was under the influence of alcohol, or being at work under the influence of alcohol. That's G(4). There was also G(5) which was the drugs or alcohol rule; possession, selling or use on the premises or habitual use and the other elements in G(5).

In contrast to that, what I have in this case is a substantial change. It's not merely an additional urine [116] analysis test as in *Burlington I* or *Burlington III*. It, of course, does not involve the use of a dog as in *Burlington II*. However, I have a very comprehensive rule which forbids possession, use, appearance at work under the—I'm sorry, I have a comprehensive program for monitoring, testing and punishing employees and following up on detected drug-alcohol use. And I would specifically find that the program does constitute a major dispute in its implementation and that the union would be entitled to the injunction it seeks under the Railway Labor Act.

Secondly, the management rights provision, the contract does contain this specific provision: "Employees covered by the agreement shall be governed by all company rules, regulations tand orders previously or hereafter issued by proper authority of the company which are not in conflict with the terms ard conditions of this agreement and which have been made available to the employees prior to becoming effective."

Defendant Southwest argues that unlike the 3 *Burlington* cases the agreement in this case gave management the prerogative to issue rules, regulations and orders during the term of the coilective bargaining agreement.

I would reject the argument based on the management rights provision. In this regard I also rely on *Burlington II*, the Montana District Judge's decision, and in that case there was an argument by the railroad that it was simply asserting its [117] management rights in implementing the additional drug testing in that case, which again was the use of the dog and also the additional urine analysis test. They claim the right to take that action as a matter of management prerogative as long as it didn't conflict with the terms of the agreement, which it did not in that case.

The District Judge in Montana rejected that decision noting that the absence of a—of a particular method of enforcement of drug testing or detection does not necessarily establish that that could be used, but rather that the conspicuous absence may reflect the fact that a particular method tolerable to both sides has existed over time and then made the finding I've noted earlier that the parties had acquiesced in the visual surveillance method by which the railroad could detect violations.

The evidence in this case fortunately is much less sketchy than in *Burlington Northern*. That's because the problem is not as acute as the alcohol problem appeared to be at *Burlington*. And again I have specific evidence of only the Lopez matter where discipline was involved and Moran where the employee was put on probation for absences.

In concluding that this was a major dispute and in rejecting the management rights argument, I would also note that in the Lopez situation the testimony before me was that the company did not consider terminating Lopez for failing to take [113] the drug test and that indeed, that it was the right of the individual Lopez to refuse to take the test if he so desired.

I would also note that the changes in these new rules are not covered in a number of respects by the existing rules. Again the existing rules covered in G(4), coming—

to work with the appearance of being intoxicated and in G(5), possession, using or selling either drugs or alcohol on the premises, or while in uniform or habitual use. In contrast the drug-alcohol policy statement that was implemented on January 1 goes much beyond those 2 rules. For example, the employees may be terminated for coming to work if there is any detectible level of drugs in the system. A specific alcohol level is given, .05 percent, which was not present in the prior rules.

New rules also cover prescription drugs and over-the-counter medication which would not be covered by the rules G(4) and G(5) unless you gave a very unusual definition to illegal or dangerous drugs in the language in G(5).

The new program also covers possession on the premises of drug paraphernalia, literature promoting illegal drug or substance use.

Specifically in paragraph 4 of the program, there are a number of changes, without repeating all of them, that while it may be that paragraph 3 wherever management has a reasonable suspicion to believe the policy has been violated, would be consistent with past practice. None of the others would be [119] consistent with past practices as the evidence establishes.

Then finally the remaining argument—I'm sorry, there is a remaining alternative argument on the major-minor issue, and the union does argue that even if Southwest had the right to impose additional drug testing under rules G(4) and G(5) and a management rights clause that the provisions of the rules involved in the January 1, 1987 program are themselves major disputes. I would accept the arguments made by the union in that regard. I'll only indicate a couple of the major changes. One is paragraph IV(A)(1) which is testing after car or aircraft damage accident; IV(A)(2), which is testing after on duty accident or on-the-job injury; IV(A)(4) which concerns the physical for a position for which the employees have applied, being required to take drug and

alcohol tests if they qualify for that; IV(B) employees release form. Those are simply examples. Others are cited in the union brief from pages 9 through 13.

The final finding and conclusion, which I will make, concerns the alternative argument and that's even if I am incorrect and if this were a minor dispute, as Southwest argues, then injunctive relief would be appropriate under traditional principles. Here if a suit is found to be minor a District Court does have discretion to issue an injunction to maintain status quo during pendency of arbitration, if the relief is necessary in order to preserve the integrity and jurisdiction of [120] the arbitration proceeding or to prevent irreparable harm that would render any subsequent arbitration decision meaningless.

Southwest argues that there would be no irreparable harm because it is willing to and will stipulate that the adoption of the drug-alcohol policy statements is within the arbitration procedure, and that if an employee were disciplined under this drug-alcohol policy statement, that the discharge of an employee, if determined to be wrongful, could be adequately remedied by reinstatement of employment with full back pay and restoration of all benefits and no loss of sen[i]ority.

However, I would find under the evidence presented that there is an additional element of irreparable harm besides the economic harm that could be rectified by arbitration. And that would be when an employee is accused of violating drug-alcohol policy, and that could occur either in a situation like Lopez, it could occur in a situation after an accident, when drug testing is determined to be required by Southwest under the drug-alcohol policy statement. It could also occur when an individual refused to take a drug test in accordance with the alcohol policy statement.

Testimony indicates that the bargaining unit members are licensed, that having an accusation made of a violation of a drug-alcohol policy, even if an employee is reinstated may be difficult, if not impossible, to erase. Also

it may have some direct impact upon the ability of the employees in the [121] bargaining unit to find jobs with other companies besides Southwest either if they refuse to take the test and then are trying to find another job to mitigate damages or if after arbitration and reinstatement they should leave and then go to—attempt to go to another company to work.

The question, without question to me, is a close one, whether it's major or minor dispute being the major issue. And basically I have concluded that I have a substantially different situation presented to me by the very comprehensive drug-alcohol policy statement than was present in any one of the Burlington cases.

I will deny the Motion to Dismiss which was filed by Southwest Airlines.

I will grant the Temporary Injunction sought by the Teamsters, and I will continue that injunction in effect pending the appeal, which I hope gets a quick resolution on appeal.

The comments I think will tell the 5th Circuit why I did what I've done so that you will be able to take these comments as the decision and go forward with the appeal promptly.

None of the comments that I have made are intended to disparage in any respect the drug-alcohol policy statement. Indeed it appears to be a very reasonable effort to meet a serious problem. And although there have not been any accidents to bring into question the safety record of Southwest Airlines, [122] there is no doubt that Southwest is to be commended for attempting to meet the problem. And as I indicated in some of the questions, I see it almost every Friday afternoon when I'm sentencing in cocaine and amphetamine cases and it is a serious problem. And by the same token, I don't think the union has taken a position that the—that this is not a necessary step and that they're simply saying that negotiations should take place.

And finally none of these comments would keep the parties from getting together and settling the case if they wanted to do so. I'm not even encouraging an appeal.

As to the request by the union that the employees be notified, I don't think that's really necessary at this point. I think that all that needs to be done is just to enjoin the enforcement of those policies pending the dispossession of matter on the appeal and I'm primarily concerned with there not being discipline. I think if they just remain in place, but not enforced pending the resolution of this on appeal. And I don't know if you plan to ask the 5th Circuit to stay but it's conceivable they may grant a stay.

Finally, as to the alternative relief I would grant the alternative relief in the form which you requested, which would be simply an injunction pending the disposition of this by the arbitrator.

Have I forgotten anything?

[123] MR. GILLESPIE: We would ask that bond be waived in terms of this injunction. There is no showing of likely harm to the company if the injunction is granted.

THE COURT: Mr. Harris, you want to respond now or you can wait if you want the time to think about that.

MR. HARRIS: I think we would like to have an opportunity to think about that. I think we can all think of an extreme circumstance where the damages would be immeasurable, God forbid but—

THE COURT: Yes. Well, I obviously am not rendering any injunction to keep Southwest from enforcing the drug-alcohol program as exists under G(4) and (5) and I see plenty of flexibility for enforcement of that policy.

Why don't you—you need to prepare the Judgment for me, the Temporary Injunction, and need to let Mr. Harris see it to see if he has any wording changes that you all could work out in advance. If you all do have a dispute just submit them informally to me by letter and I'll resolve those and get it issued quickly. I would like to get it done very promptly so that you can go on your appeal

just as quickly as possible. Can we get that done by Friday of this week?

MR. HARRIS: Certainly.

MR. GILLESPIE: Certainly.

THE COURT: I do appreciate the expeditious manner in which both sides put on the case. The briefs were excellent. I [124] just wish you had some airline cases instead of Burlington Railroad cases.

We will stand adjourned.

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CERTIFICATION

I, JOE BELTON, certify that during the proceedings in the foregoing styled and numbered cause, I was the official Court Reporter and took in stenograph notes such proceedings and have transcribed the same by computer as shown by the above and foregoing pages 1 through 127 and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the ——— day of ——— 1987.

U.S. District Court Reporter
For the Northern District of Texas
Dallas Division

APPENDIX E

RAILWAY LABOR ACT

May 20, 1926, c. 347, 44 Stat. 577, as amended

Title 45, U.S.C.A., §§ 151 to 188

SUBCHAPTER I—GENERAL PROVISIONS

§ 151. Definitions; short title

When used in this chapter and for the purposes of this chapter—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act [1], and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason

of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the provision of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

§ 151a. General purposes

The purposes of the chapter are :(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make

and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter,[1] then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out

of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers, and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regard-

less of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to repsent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organizaiton in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the juris-

dictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected

by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the fares under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon

directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispuite submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters,

and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers, directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when propertly submitted, at any place designated by the division: *Provided, however*, That except as provided in para-

graph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In a case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the

Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to com-

ply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court of the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet

reguarly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports

of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards; establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board,

the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and

reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§ 154. National Mediation Board

First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal

The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, Officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1965, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occuring prior to the expiration

of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provision of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office; or ineligibility, but for no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report

The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Eacch member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. Appointment of experts and other employees; salaries of employees; expenditures

The Mediation Board may (1) subject to the provisions of the civil service laws [1], appoint such experts and assistants to act in a confidential capacity and such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 153 of this title, and boards of arbitration, in accordance with the provisions of this section and section 153 and 157 of this title, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. Delegation of powers and duties

The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such

assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [and] such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. Transfer of officers and employees of Board of Mediation; transfer of appropriation

All officers and employees of the Board of Mediation (except the members thereof, whose offices are abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so distinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each

contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties in-

terested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. Arbitration

First. Submission of controversy to arbitration

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151 to 156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Manner of selecting board of arbitration

Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties re-

spectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure

(a) Notice of selection or failure to select arbitrators

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by

counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of its award to thhe respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.[1]

(g) Compensation of assistants to board of arbitration; expenses; quarters

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees

All testimony before said board shall be given under oath or affirmation, and any member of the board shall

have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, went so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(*l*) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

§ 159. Award and judgment thereon; effect of chapter on individual employee

First. Filing of award

The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award; judgment

An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Impeachment of awards; grounds

Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. Effect of partial invalidity of award

If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth: Appeal; record

At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmited to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of court of appeals

The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained

If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have thhe same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

§ 159a. Special procedure for commuter service

(a) Applicability of provisions

Except as provided in section 590(h) of this title, the provisions of this section shall apply to any dispute subject to this chapter between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

(b) Request for establishment of emergency board

If a dispute between the parties described in subsection (a) of this section is not adjusted under the foregoing provisions of this chapter and the President does not, under section 160 of this title, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish such an emergency board.

(c) Establishment of emergency board

(1) Upon the request of a party or a Governor under subsection (b) of this section, the President shall create an emergency board to investigate and report on the dispute in accordance with section 160 of this title. For purposes of this subsection, the period during which no

change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the day of the creation of such emergency board.

(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a) of this section, the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.

(d) Public hearing by National Mediation Board upon failure of emergency board to effectuate settlement of dispute

Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

(e) Establishment of second emergency board

If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

(f) Submission of final offers to second emergency board by parties

Within 30 days after creation of a board under subsection (e) of this section, the parties to the dispute shall submit to the board final offers for settlement of the dispute.

(g) Report of second emergency board

Within 30 days after the submission of final offers under subsection (f) of this section, the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(h) Maintenance of status quo during dispute period

From the time a request to establish a board is made under subsection (e) of this section until 60 days after such board makes its report under subsection (g) of this section, no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.

(i) Work stoppages by employees subsequent to carrier offer selected; eligibility of employees for benefits

If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h) of this section, the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act [45 U.S. C.A. § 351 et seq.].

(j) Work stoppages by employees subsequent to employees offer selected; eligibility of employer for benefits

If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h) of this section, the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

§ 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter

and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including thhe compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

§ 161. Effect of partial invalidity of chapter

If any section, subsection, sentence, clause, or phrase of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. All Acts or parts of Acts inconsistent with the provisions of this chapter are repealed.

§ 162. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this chapter.

§ 163. Repeal of prior legislation; exception

Chapters 6 and 7 of this title, providing for mediation, conciliation, and arbitration, and all Acts and parts of Acts in conflict with the provisions of this chapter are repealed, except that the members, secretary, officers, employees, and agents of the Railroad Labor Board, in office on May 20, 1926, shall receive their salaries for a period of 30 days from such date, in the same manner as though this chapter had not been passed.

SUBCHAPTER II—CARRIERS BY AIR

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, privileges prescribed and established by the provisions of subchapter except section 153 of this title shall apply to said carriers by and their employees in the same manner and to same extent as though such carriers and the employees

were specifically included within the inition of "carrier" and "employee", respectively section 151 of this title.

§ 183. Disputes within jurisdiction of Mediation Board

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of National Mediation Board and the jurisdiction said Mediation Board is extended to any of following cases:

(a) A dispute concerning changes in rates of rules, or working conditions not adjusted by parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or when conferences are refused.

The National Mediation Board may proffer services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this subchapter in the same manner and to the same extent as are the disputes covered by section 155 of this title.

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment

board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

§ 185. National Air Transport Adjustment Board

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of

this chapter, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this subchapter. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board

of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-178

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA—AIRLINE DIVISION AND TEAMSTERS LOCAL 19,
Petitioner

v.

SOUTHWEST AIRLINES COMPANY

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 20, 1989.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of September, 1989.

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AIRLINE DIVISION, AND TEAMSTERS LOCAL 19,
Petitioners,

v.

SOUTHWEST AIRLINES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In deciding that the parties' collective bargaining agreement *arguably* authorized the employer to implement unilaterally a drug testing program, did the court of appeals render a decision in conflict with applicable decisions of this Court?

II.

In deciding that the parties' collective bargaining agreement *arguably* authorized the employer to implement unilaterally a drug testing program, did the court of appeals render a decision in conflict with a decision of another federal court of appeals on the same matter?

RULE 28.1 LISTING

Southwest Airlines Co. has no parent or affiliate companies. The only subsidiary is wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-664

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AIRLINE DIVISION, AND TEAMSTERS LOCAL 19,
Petitioners,

v.

SOUTHWEST AIRLINES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The essential facts are not in dispute and are set forth in the *en banc* opinion of the Fifth Circuit, reported at 875 F.2d 1129. The *en banc* opinion of the Fifth Circuit is reproduced as Appendix A of the petition for writ of certiorari. References in this brief to the *en banc* opinion of the Fifth Circuit are to the cited page numbers in Appendix A of the petition for writ of certiorari.

Respondent Southwest is a common carrier by air subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Petitioners Teamsters represent Southwest's mechanics and related employees. Article 2, Para-

graph 4 of the parties' collective bargaining agreement provides:

> Employees covered by this Agreement shall be governed by all Company rules, regulations, and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement, and which have been made available to the employee prior to becoming effective.

(Pet. 2a.)

Before 1986, Southwest's drug and alcohol policy consisted mainly of Rule G, a rule of many years' standing which had been unilaterally promulgated. Its provisions defined "serious, unacceptable conduct" and included the following:

> 4. Reporting for or carrying on work while showing any signs of the use of intoxicants or knowingly permitting another employee to do so is strictly prohibited.
>
> 5. Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on Company premises or while in uniform and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated.

Rule G had no significant history of enforcement; nor did Southwest have a known problem with employee use of alcohol or drugs. Nevertheless, Southwest decided to expand its drug policy. Specifically, it decided to implement a drug and alcohol testing program. The program is comprehensive and detailed. It prohibits

detectable levels of illegal drugs, defined blood alcohol levels, and any level of medication that could impair performance, as well as any possession of illegal drugs. To enforce these prohibitions, the program mandates pre-employment urine drug screening, and urine drug screening of employees after accidents or if management has a reasonable suspicion of drug or alcohol use. The program establishes detailed testing procedures, and prescribes punishment, including discharge, for violations of the policy. (Pet. 2a-3a.)

On October 16, 1986, Southwest informed the Teamsters of its intent to implement the program. The Teamsters then sought to bargain over the terms of the program. Southwest was willing to discuss the program, but refused to negotiate its terms with the Teamsters. Other unions did participate in discussions with Southwest, and these discussions affected the shape of the program. (Pet. 3a.)

In December of 1986, the Teamsters filed this action, seeking to enjoin Southwest's unilateral implementation of the program. In January of 1987, the district court granted a preliminary injunction.[1] The district court reasoned that the implementation of the program was not arguably justified under the terms of the collective bargaining agreement and that, therefore, the dispute was "major." In the alternative, the district court held that even if the dispute were "minor", a preliminary injunction was warranted because of the likelihood of irreparable harm to employees if the program were enforced before the

[1] Contrary to the statement of Petitioners at Page 5 of their petition, Southwest did not implement the program on January 1, 1987. Rather, Southwest merely *proposed* to implement the program on that date.

Teamsters' objections to the program could be arbitrated. (Pet. 3a.)

Southwest appealed the preliminary injunction, and a panel of the Fifth Circuit affirmed. 842 F.2d 794. Southwest timely sought re-hearing *en banc*, which was granted. On re-hearing, the *en banc* court concluded that the contractual language quoted above *arguably* grants to Southwest the right unilaterally to implement the drug testing program in question. Further, the *en banc* court concluded that under the circumstances presented in this case, an injunction to maintain the status quo pending arbitration was unwarranted. Accordingly, the injunction entered by the district court was vacated.[2] (Pet. 14a.)

Summary of Argument

I.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ___, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989) (hereafter "*Conrail*"). Contrary to Teamsters' argument, the *en banc* opinion of the Fifth Circuit is in conformity with this Court's decision in *Conrail*.

---

[2] In Footnote 1 of their petition, Petitioners state: "There is presently pending in the Fifth Circuit a motion to affirm the district court's final dismissal in favor of Southwest." (Pet. 3.) This statement is incorrect. On September 12, 1989, a panel of the Fifth Circuit granted the motion to affirm the district court's final dismissal in favor of Southwest. A copy of the Fifth Circuit's order of September 12, 1989, is re-produced as Appendix A hereto.

In *Conrail*, this Court affirmed and adopted the test uniformly utilized by various courts of appeals in determining whether a dispute is "minor" or "major" under the Railway Labor Act. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 105 L. Ed. 2d 264. This is precisely the same standard utilized by the Fifth Circuit in its *en banc* opinion.

II.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with four decisions of other United States courts of appeals. As will be more fully developed below, all four decisions are factually inapposite. With only one exception, *none* deals with the issue of whether express contract language arguably justified the employer's unilateral action. Further, two of the decisions have been vacated by this Court and remanded for reconsideration. Finally, one decision is cited for a proposition directly contrary to its actual holding. Consequently, the *en banc* opinion of the Fifth Circuit is not in conflict with any of the cited decisions.

Reasons for Denying the Writ

I.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with this Court's decision in *Conrail*. Analysis of the substance of their argument, however, reveals that Teamsters are actually

requesting this Court to abandon the test enunciated in *Conrail* and adopt a different standard.

In *Conrail*, this Court adopted and affirmed the standard uniformly utilized by various courts of appeals in determining whether a dispute is major or minor under the Railway Labor Act: "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 105 L. Ed. 2d 264.

Teamsters argue, however, that where the issue involves a management rights clause which purportedly grants to management a degree of freedom to act unilaterally within a sphere of activity, the Court should not utilize the "arguably justified" standard. Rather, Teamsters argue that the Court should then apply a stricter standard, i.e., the Court should determine whether there has been a "clear and unmistakable waiver" by the Union concerning the proposed action. This higher standard, i.e., the "clear and unmistakable waiver" standard, completely eviscerates the "arguably justified" standard enunciated by this Court in *Conrail*.

First, as this Court noted in *Conrail*, under the "arguably justified" standard, the party seeking to establish that the dispute is minor and, therefore, arbitrable, bears a "relatively light burden." *Id.* Contract waiver, on the other hand, cannot be lightly inferred. A party seeking to establish contract waiver has an onerous burden of establishing that waiver is "clear and unmistakable." ***Metropolitan Edison Co. v.***

NLRB, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983). Placing such an onerous burden on a party seeking to establish the arbitrability of a dispute would be contrary to this Court's historic position of resolving any doubts in favor of arbitrability.

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 1417-18, 80 S. Ct. 1347 (1960).

Secondly, adoption of the "clear and unmistakable waiver" standard suggested by Teamsters would require this Court to become embroiled in interpretation of the parties' collective bargaining agreement. Under both the RLA and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, this Court has steadfastly refused to usurp the contract interpretation function of the arbitral tribunal. While reviewing a case arising under the NLRA, this Court observed:

> The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which, on its face, is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 1406-07, 80 S. Ct. 1343 (1960).

While there is a strong federal labor policy favoring arbitration under the NLRA, there is an even stronger impetus favoring arbitration under the RLA. Under the NLRA, arbitration of disputes is not mandatory, but is a matter of contract between the parties. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962). Arbitration under the RLA, however, is not optional. In the RLA, Congress fashioned an arbitration procedure which is "mandatory, exclusive, and comprehensive." *Brotherhood of Locomotive Engineers v. Louisville & National R.R.*, 373 U.S. 33, 10 L. Ed. 2d 172, 83 S. Ct. 1059 (1963). Pursuant to this statutory scheme, neither federal nor state courts have authority or jurisdiction to interpret RLA collective bargaining agreements. *Order of Ry. Conductors of Am. v. Pitney*, 326 U.S. 561, 90 L. Ed. 318, 66 S. Ct. 322 (1946).

Thirdly, if the Court were to adopt and use the standard suggested by Teamsters, the Court would be deciding the merits of the parties' dispute. For once the Court decided there was or was not "clear and unmistakable waiver", the controversy is at an end. "But under the RLA, it is not the role of the courts to decide the merits of the parties' dispute. Our role is limited to determining where the 'arguably justified' line is to be drawn." *Conrail* at 105 L. Ed. 2d 271.

Finally, if the Court were to adopt the suggested higher level of scrutiny when reviewing management rights clauses, the Court would be passing judgment upon the merit of the substantive terms of the parties' collective bargaining agreement. Under both the NLRA

and the RLA, there is a strong federal labor policy "against governmental interference with the substantive terms of collective bargaining agreements." *Chicago & Northwestern Ry. Co. v. United Transp. Union*, 402 U.S. 570, 29 L. Ed. 2d 187, 194, n. 11, 91 S. Ct. 1731 (1971); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937); *H.K. Porter Co., Inc. v. NLRB*, 379 U.S. 99, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 96 L. Ed. 1027, 72 S. Ct. 824 (1952).

Significantly, in *Conrail*, this Court considered and rejected an argument similar to that being made by Teamsters in the case *sub judice*:

> . . . Collective bargaining agreements often incorporate express or implied terms that are designed to give management . . . a degree of freedom of action within a specified area of activity. . . . We have held under the National Labor Relations Act (NLRA), that no principle of labor law prohibits 'bargaining for . . . flexible treatment'. . . . We find no difference between the NLRA and the RLA in this respect. Yet the union would subject to especially strict scrutiny the bona fides of contractual claims arising out of contract terms that grant management the power to respond flexibly to changing circumstances. The effect of a selectively heightened level of scrutiny (a 'clear and patent' rather than an 'arguably justified' standard) would be to limit the enforceability of such contract terms, by requiring employers rigidly to maintain the status quo pending arbitration

> of their right to be flexible. That result is odd in itself . . . , and has unacceptable implications. To accept the . . . standard the union advocates would, in effect, be impermissibly to 'pass upon the desireability of the substantive terms of labor agreements,' . . . by affording flexible terms a less favored status.

105 L. Ed. 2d at 265.

In summary, contrary to Teamsters' argument, the *en banc* opinion of the Fifth Circuit is not in conflict with this Court's decision in *Conrail*. Indeed, quite to the contrary, the *en banc* opinion of the Fifth Circuit is consonant with this Court's decision in *Conrail* and is consonant with this Court's long-standing history of favoring arbitration of labor disputes.

II.

Teamsters argue that the *en banc* opinion of the Fifth Circuit is in conflict with the following decisions of other United States courts of appeals: *Transport Workers Union of Philadelphia v. Southeastern Pennsylvania Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (hereafter *"TWU v. SEPTA"*); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*, 838 F.2d 1087 (9th Cir. 1988) (hereafter *"BLE v. Burlington Northern I"*); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*, 838 F.2d 1102 (9th Cir. 1988) (hereafter *"BLE v. Burlington Northern II"*); and *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986) (hereafter *"BMWE v. Burlington Northern"*).

Preliminarily, it should be noted that all of these cases are factually distinguishable from the case *sub judice*. With only one exception to be discussed more fully below, *none* of these cases involved the question of whether express contract language arguably justified the proposed unilateral action.

A. *TWU v. SEPTA*. In this case, the Third Circuit initially affirmed the district court's conclusion that the unilateral implementation of random drug and alcohol testing differed sufficiently from prior practice to create a major dispute under the RLA. The employer had argued, *inter alia*, that it had reserved the right to modify unilaterally its drug testing procedures through a contractual clause which retained "all management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this agreement." 863 F.2d at 1124. In the case *sub judice*, however, the language in question specifically reserves unto management a degree of freedom of action within a described area of activity, i.e., the express right unilaterally to promulgate new rules, regulations, and orders during the term of the contract. Consequently, *TWU v. SEPTA* is factually distinguishable from the case *sub judice*.

Dispositive of the Teamsters' argument, however, is the fact that *TWU v. SEPTA* was vacated and remanded by this Court on June 26, 1989. "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of" . . . *Conrail*. 106 L. Ed. 2d 560. Moreover, on remand, in an opinion dated September 1, 1989, the Third Circuit concluded that the underlying dispute was a *minor* dispute under the RLA. 884 F.2d 709.

B. *BLE v. Burlington Northern I.* This case did not involve the question of whether *express* contract language authorized the proposed action. Rather, the employer had argued that since the contract was silent on the issue, enforcement of employee rules was "a matter entirely within its managerial prerogative." 838 F.2d at 1089-90. Unlike the case *sub judice*, there was no *express* contract language authorizing the employer to promulgate new rules, regulations, and orders during the term of the collective bargaining agreement.

The Ninth Circuit utilized a Fourth Amendment analysis in reaching its conclusion that the drug testing in question constituted a major dispute under the RLA. On June 26, 1989, this Court vacated and remanded the Ninth Circuit decision. "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. ___, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)" (rejecting Fourth Amendment rationale similar to Ninth Circuit analysis). 106 L. Ed. 2d 558.

C. *BLE v. Burlington Northern II.* Once again, this case is factually inapposite. It does not involve the question of whether *express* contract language arguably justified the proposed action. Rather, the employer argued that inasmuch as the contract was silent, it had impliedly retained the managerial prerogative to implement unilaterally the use of "sniffer dogs" for the detection of prohibited substances. Finding that there already existed an implied contrary agreement concerning the detection of controlled substances, the Ninth Circuit noted: "We express no

opinion as to whether measures such as those imposed by BN in this case could be justified as an exercise of managerial prerogative in the absence of an implied agreement." 838 F.2d at 1105, n. 5.

D. *BMWE v. Burlington Northern*. Teamsters egregiously misstate the holding in this case. More particularly, at page 7 of their petition, Teamsters cite the case in support of the proposition that numerous courts of appeals have found that changes in drug testing methodology constitute *major* disputes under the RLA. (Pet. 7.) Contrary to Teamsters' misstatement, *BMWE v. Burlington Northern* held that the changes in question constituted *minor* disputes. The employer had proposed to add drug testing to post-furlough physical examinations. Additionally, the employer sought to implement post-incident drug testing. The Eighth Circuit concluded that the two changes were both *minor* under the RLA.

In summary, all of these cited cases are factually distinguishable from the case *sub judice*. With one exception, none dealt with the issue of whether express contract language authorized the proposed unilateral action. In the one case dealing with an express management rights clause, *TWU v. SEPTA*, the clause was factually distinguishable from the language in the case *sub judice*. Moreover, and dispositive, this Court vacated and remanded the case for further consideration in light of *Conrail*. On remand, the Third Circuit concluded that the underlying dispute was *minor* under the RLA. Consequently, none of the foregoing cases provides a basis for conflict with the *en banc* opinion of the Fifth Circuit.

Conclusion

The *en banc* opinion of the Fifth Circuit is not in conflict with this Court's decision in *Conrail*. Further, the *en banc* opinion of the Fifth Circuit is not in conflict with a decision of another court of appeals. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-1731

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA-AIRLINES DIVISION & LOCAL 19,
Plaintiffs-Appellants,

versus

SOUTHWEST AIRLINES COMPANY,
Defendant-Appellee.

U.S. COURT OF APPEALS

FILED

SEP 12 1989

GILBERT F. GANUCHEAU CLERK

Appeal from the United States Court of Appeals for the Northern District of Texas

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Before KING, HIGGINBOTHAM and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant to consolidate this case with No. 87-1085 for the purpose of permitting appellant to seek a writ of certiorari before the United States Supreme Court is GRANTED

IT IS FURTHER ORDERED that appellant's motion to affirm the dismissal of the District Court in this case is GRANTED.